

# THE PRESIDENT'S CONSTITUTIONAL DUTY TO FAITHFULLY EXECUTE THE LAWS

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## HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED THIRTEENTH CONGRESS FIRST SESSION

DECEMBER 3, 2013

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## THE PRESIDENT'S CONSTITUTIONAL DUTY TO FAITHFULLY EXECUTE THE LAWS

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TUESDAY, DECEMBER 3, 2013

HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
*Washington, DC.*

The Committee met, pursuant to call, at 10:21 a.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Smith of Texas, Chabot, Bachus, Issa, King, Franks, Gohmert, Jordan, Poe, Marino, Gowdy, Labrador, Farenthold, Holding, Collins, DeSantis, Conyers, Nadler, Scott, Lofgren, Jackson Lee, Cohen, Gutierrez, Garcia, and Jeffries.

Staff present: Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Zachary Somers, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; Heather Sawyer, Counsel; and Tom Jawetz, Counsel.

Mr. GOODLATTE. The Judiciary Committee will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

The Chair welcomes the members of the audience who are here, but any member who disrupts this meeting will be removed. And presently we do not have order in the hearing room. Members of the audience must behave in an orderly fashion or else they will be removed from the hearing room. Rule 11 of the House rules provides that the Chairman of the Committee may punish breaches of order and decorum by censure and exclusion from the hearing. So if there are members here who wish to remain, they should sit down immediately or leave the room immediately, or they will be escorted from the room.

Today's hearing is about the President's role in our constitutional system. Our system of Government is a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. The President is charged with executing the laws; the Congress with writing the laws; and the Judiciary with interpreting them.

The Obama administration, however, has ignored the Constitution's carefully balanced separation of powers and unilaterally granted itself the extra-constitutional authority to amend the laws and to waive or suspend their enforcement. This raw assertion of

authority goes well beyond the “executive power” granted to the President and specifically violates the Constitution’s command that the President is to “take care that the laws be faithfully executed.”

The President’s encroachment into Congress’ sphere of power is not a transgression that should be taken lightly. As English historian Edward Gibbon famously observed regarding the fall of the Roman Empire, “the principles of a free constitution are irrevocably lost when the legislative power is dominated by the executive.”

Although the President’s actions may not yet amount to the executive powers overtaking the legislative power, they are certainly undermining the rule of law that is at the center of our constitutional design. From Obamacare to immigration, the current Administration is picking and choosing which laws to enforce. But the Constitution does not confer upon the President the “executive authority” to disregard the separation of powers by unilaterally waiving, suspending, or revising the laws. It is a bedrock principle of constitutional law that the President must “faithfully execute” Acts of Congress. The President cannot refuse to enforce a law simply because he dislikes it.

Certainly presidents have from time to time made broad claims of executive power. However, assertions of executive authority have traditionally been limited to the area in which presidential powers are at their strongest—Foreign affairs. The Obama administration, though, has been equally assertive in the realm of domestic policy, routinely making end runs around Congress through broad claims of prosecutorial discretion and regulatory actions that push executive power beyond all limits. Indeed, President Obama is the first President since Richard Nixon to ignore a duly enacted law simply because he disagrees with it. In place of the checks and balances established by the Constitution, President Obama has proclaimed that, “I refuse to take no for an answer,” and that “where Congress won’t act, I will.”

Throughout the Obama presidency we have seen a pattern: President Obama circumvents Congress when he does not get his way.

For instance, while Congress is currently debating how to reform our immigration laws, the President effectively enacted the DREAM Act himself by ordering immigration officials to stop enforcing immigration laws against certain unlawful immigrants.

When he could not get his preferred changes to the No Child Left Behind education law, he unilaterally waived its testing accountability provisions.

When he objected to the work requirements in the bipartisan welfare reform law, he granted waivers that are specifically forbidden by the statutory text.

Instead of working with Congress to amend Federal drug enforcement policy, he has instructed prosecutors to stop enforcing certain drug laws in certain States and mandatory minimum sentences for certain offenses.

And most notably, the President has—without statutory authorization—waived, suspended, and amended several major provisions of his health care law. These unlawful modifications to Obamacare include: delaying for 1 year Obamacare’s employer mandate; instructing States that they are free to ignore the law’s clear lan-

guage regarding which existing health care plans may be grandfathered; and promulgating an IRS rule that allows for the distribution of billions of dollars in Obamacare subsidies that Congress never authorized.

The House has acted to validate retroactively some of the President's illegal Obamacare modifications. However, rather than embrace these legislative fixes, the President's response has been to threaten to veto the House-passed measures. The President's far-reaching claims of executive power, if left unchecked, will vest the President with broad domestic policy authority that the Constitution does not grant him.

Those in the President's political party have been largely silent in the face of this dangerous expansion of executive power. But what would they say if a President effectively repealed the environmental laws by refusing to sue polluters or the labor laws by refusing to find violators? What if a President wanted tax cuts that Congress would not enact? Could he instruct the IRS to decline to enforce the income tax laws? President George H. W. Bush proposed, unsuccessfully, a reduction in the capital gains rate. Should he have, instead, simply instructed the IRS not to tax capital gains at a rate greater than 10 percent?

The point is not what you think of any of President Obama's individual policy decisions. The point is the President may not—consistent with the command that he faithfully execute the laws—unilaterally amend, waive, or suspend the law. We must resist the President's deliberate pattern of circumventing the legislative branch in favor of administrative decision-making. We cannot allow the separation of powers enshrined in our Constitution to be abandoned in favor of an undue concentration of power in the executive branch.

As James Madison warned centuries ago in *Federalist No. 47*, “the accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”

It is now my pleasure to recognize the Ranking Member of the Judiciary Committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you. And good morning, top of the morning to the witnesses and to my colleagues on the House Judiciary Committee.

The President's constitutional duty to faithfully execute the laws would be an important issue worthy of a hearing by this Committee if there was any evidence that the President has, indeed, failed to fulfill his duty. But, unfortunately, it appears that some here view policy disagreements as constitutional crises and proof of possible wrongdoing. The fact is that disagreements or even allegations that a program is not being carried out the way Congress intended should not raise constitutional concerns.

If some of my friends want to disagree with the Administration, it is, of course, certainly their right. But we should keep some perspective here and consider the following issues.

To begin with, some of the Administration's actions criticized by the majority are not really that much out of the ordinary. Allowing flexibility in the implementation of a new program, even where the

statute mandates a specific deadline, is neither unusual nor a constitutional violation. It is, rather, the reality of administering sometimes complex programs.

This has been especially true in the case of health care legislation. The Affordable Care Act is not the first time implementation of a new law has not gone according to schedule. President George W. Bush, for example, failed to meet some of the deadlines in Medicare Part D even though it was legislation he strongly supported. And it is especially interesting that some Members who strenuously opposed the Affordable Care Act and who worked diligently to obstruct its implementation now complain that the President is unconstitutionally impeding the implementation of his signature legislative accomplishment. How interesting.

Taking steps to deal with the realities of implementation of a complex program hardly constitutes a failure to take care that the laws are faithfully executed. It is, rather, part and parcel of doing just that.

There have been Administrations in the past that have obstructed the implementation of laws they opposed, but no one is seriously contending that President Obama opposes the Affordable Care Act, “Obamacare,” or that his Administration’s actions constitute intentional obstruction of the law. And when in the past there have been legitimate concerns about delays in a law’s implementation, parties have turned to the Administrative Procedure Act. That act allows the courts to determine whether a delay is unreasonable and order appropriate relief. Notably, no one has alleged that such action is necessary here. Instead, critics of President Obama and his signature legislation allege a constitutional crisis, but no court has ever found delay in implementation of a complex law to constitute a violation of the Take Care Clause.

Now, some of my colleagues seem to think that the exercise of prosecutorial discretion, a traditional power of the executive, is a constitutional violation. The decision, for example, to defer deportation of individuals who were brought to the United States as children who have not committed felonies or misdemeanors and do not pose a threat to public safety—so-called “DREAMers”—is a classic exercise of such discretion. The Administration cannot legalize these individuals’ status without a basis in law, but the Administration’s decision to defer action against particular individuals is neither unusual nor unconstitutional.

The Supreme Court has consistently held that the exercise of such discretion is a function of the President’s powers under the Take Care Clause. For example, in *Heckler v. Chaney*, the Court held that an agency’s refusal to institute proceedings shares to some extent the characteristics of a decision of a prosecutor in the executive branch not to indict, a decision which has long been regarded as the special province of the executive branch, inasmuch as it is the executive who is charged by the Constitution to “take Care that Laws be faithfully executed.”

Finally, I hope we can distinguish between failing to execute the laws and following the explicit dictates of the law. Some here contend that the President’s decision not to defend the Defense of Marriage Act violated the Take Care Clause. In fact, the President made a judgment, subsequently vindicated by the United States



Supreme Court, that the act was unconstitutional, but while the case was pending, he continued to comply with the law.

The President's decision not to defend the law was not novel. Indeed, Congress itself recognized this possibility. Congress understood that sometimes the Administration's duty to take care that the laws be faithfully executed might include recognizing that a particular statute is unconstitutional. The Constitution is, as we are told in Article 6 of the Constitution, the supreme law of the land. Presidents are required to follow it.

So past Administrations have exercised their discretion not to defend a law that they have deemed unconstitutional. For example, the acting Solicitor General at the time, John Roberts, now the Chief Justice of the United States, refused to defend a law that he believed to be unconstitutional in the 1990 case of *Metro Broadcasting v. the FCC*. Chief Justice Roberts argued that a statute providing for minority preferences in broadcast licensing was unconstitutional. Despite Supreme Court precedent applying a more permissive standard of review, he argued that strict scrutiny applied. Senate legal counsel appeared as *amicus curiae* to defend the law and prevailed.

Clearly, there were reasonable arguments that Chief Justice Roberts could have made in defense of the law. Yet, no one suggested that he violated the Constitution by arguing for the Court to strike that law down. His view was not vindicated in that case but may ultimately have resulted in a shift in the law, which makes it additionally clear that the Administration's decision not to defend DOMA was neither unprecedented nor inappropriate.

And so I join with all of the Committee in welcoming our witnesses, look forward to their testimony, and I yield back the balance of my time, Mr. Chairman.

Mr. GOODLATTE. Thank you, Mr. Conyers.

Without objection, all other Members' opening statements will be made a part of the record.

[The prepared statement of Ms. Jackson Lee follows:]

[illegible]

Mr. Chairman, I have noted the public's concern recently, and by Congress throughout the history of the country over separation of powers seen most prominently in the ability of the Executive Branch to justify the use of the military and the need for war. In those times the nation looks to Congress to guide us and to ensure that suitable due diligence is done before such an undertaking is started. This hearing though, will examine whether President Obama has fulfilled his constitutional duty to "take care that the Laws be faithfully executed." U.S. Const. Art. II, §3.

"I congratulate our Republican friends' newly found concern for separation of powers and professed concerned for the faithful execution of the laws by the President.

"It is interesting to note, however, that this concern was nowhere to be found during the last Administration. We heard not a peep from them when the Bush-Cheney Administration sought to concentrate power in the executive branch of the federal government.

“From conducting warrantless wiretaps to extraordinary rendition to secret prisons abroad to presidential bill signing statements, the Bush Administration revealed itself as unrelenting foe of the system of checks and balances and separated powers so carefully crafted by the Framers.

"And nowhere was that contempt for the constitutional structure that is part of the American birthright demonstrated more clearly than with respect to the abuse and misuse of presidential signing statements.

"Instead of vetoing laws he disapproved, President Bush would sign the law passed by Congress as if he accepted its constitutional validity and then when no one but Vice-President Cheney was watching he would issue a signing statement saying he will comply with the law only to the extent he felt legally bound to do so, which of course, he didn't.

“Presidential signing statements seek to alter Congress’ primacy in the legislative process by giving the President’s intention in signing the bill equal or greater standing to Congress’

intention in enacting it. This would be a radical, indeed revolutionary, change to our system of separated powers and checks and balances.

"In less than six years, President Bush issued more than 125 signing statements, raising more than 800 constitutional objections. This is almost 500 more constitutional objections interposed in the 20 year period between 1981-2001 by the Reagan, Clinton, and first George Bush Administrations combined.

"Not coincidentally, President Bush's signing statements have challenged the constitutionality of extremely high-profile laws such as the reporting provisions under the USA PATRIOT Act of 2005, and the McCain Amendment prohibiting torture.

"The president's signing statements essentially asserted that President Bush does not believe that he is bound by key provisions of the legislation and sought to further a broad view of executive power and President Bush's view of the "unitary executive," pursuant to which all the powers lodged in the Executive and administrative agencies by Congress is somehow automatically and constitutionally vested in the President himself."

And I believe that this hearing will likely focus on:

I. Implementation of the Affordable Care Act ("ACA" or "Obamacare"), focusing on as I understand it:

- A. the Administration's July, 2013 announcement that it would delay for one year the ACA's "employer mandate," which requires large employers to offer their employees quality health insurance coverage or pay a penalty for failing to do so;
- B. the provision of subsidies to help people buy insurance on the federal health care exchange in addition to subsidies for insurance bought on state exchanges;
- C. The Administration's recent decision to allow health insurers to renew existing health insurance policies that do not meet some of the coverage requirements of the ACA so that individuals who had been notified that their policies were being canceled might re-enroll for another policy year before transitioning to a plan that complies fully with the ACA's requirements; and

II. The decision to protect certain young adults brought as children to live in the United States ("DREAMers") from immigration removal actions.

These are serious issues but I suspect that based on the Republican memorandum and the past three years which have produced over forty votes in the House to defund, render defunct, and otherwise repeal Obamacare—all to no avail—this will be an exercise in futility. I would like to welcome our witnesses—all constitutional scholars who today though are in the realm of politics.

- Michael F. Cannon, Director of Health Policy Studies, Cato Institute (Majority witness).
- Nicholas Rosenkranz, Professor of Law, Georgetown University Law Center (Majority witness).
- Jonathan Turley, Professor of Law, George Washington University (Majority witness).
- Simon Lazarus, Senior Counsel, Constitutional Accountability Center (Minority witness).

Many on this Committee may recall that in *Youngstown Sheet & Tube Co. v. Sawyer*, the mill owners argued that the President's order amounted to lawmaking. The United States government's position was that "order in question was made on findings of the President that his action was necessary to avert a national catastrophe which would result from the stoppage of steel production. And although the District Court's ruling was affirmed by the Supreme Court, I borrow from the dissent when I add that the President, in taking executive action via agency decisions, or other administrative strategies, is performing his duty under the "Take Care Clause of the Constitution.

And I think Mr. Lazarus had it right in his prepared testimony when he stated:

"...All of these efforts to import the Constitution into what are in reality political and policy debates are rhetorical make-weights. They mock the text and original meaning of the Take Care clause. They flout long-established Supreme Court precedent applying the relevant constitutional provisions. And they contradict the consistent practice of all modern presidencies, Republican and Democratic, to responsibly implement complex and consequential regulatory programs. These critics fault the Obama Administration for making necessary adjustments in timing and matching enforcement priorities with resources and practical, humanitarian, and other exigencies. But exercising presidential judgment in carrying laws into execution is precisely what the Constitution requires. It is precisely what the framers expected, when they established a separate Executive Branch under the direction of a nationally elected President, and charged him to Take Care that the Laws be Faithfully Executed..."

While there have been infrequent and infamous examples in which one branch has defied the Court—the most prominent example being President Andrew Jackson's alleged statement following the Court's decision in *Worcester v. Georgia* that "John Marshall has made his decision; now let him enforce it"—the other branches have almost unceasingly acquiesced, even in major disputes, to the Supreme Court's role. In this case the Supreme Court held that Obamacare is the law of the land—something this Congress and to a great extent—the last one—have not acquiesced to the Supreme Court's role.

Mr. Chairman, fellow colleagues, I salute us for holding this hearing.

I look forward to hearing from our witnesses and I yield back the balance of my time.

## OBAMACARE SUCCESS STORIES

**11/1/13: Teresa McUsic, Guest Column: “Like Millions Of Others, I Did Try To Sign Up On Oct. 1, The First Day The Exchange Was Open, And Like Most Americans I Found I Couldn’t Get Past The First Page To Even Set Up An Account. So I Dropped It For Three Weeks, Knowing I Had Until Mid-December For A Plan To Be Active On Jan. 1 Or Even Until March Of Next Year... Last Monday I Revisited The Website Healthcare.Gov. I Was Able To Instantly Set Up An Account ... Compared To The Federal Tax Or Financial Aid Forms I Have Filled Out, This Was A Breeze.”** “While government officials apologized profusely to Congress this week for the problems with signing up on the healthcare marketplace website, I had no problems creating an account and looking over the plan options. Maybe I should repeat that. No problems. Like millions of others, I did try to sign up on Oct. 1, the first day the exchange was open, and like most Americans I found I couldn’t get past the first page to even set up an account. So I dropped it for three weeks, knowing I had until mid-December for a plan to be active on Jan. 1 or even until March of next year if I just wanted to make the open enrollment season. Last Monday I revisited the website Healthcare.gov. I was able to instantly set up an account that required mostly the names and birth dates of my family, how we were all related to one another, and whether we smoked or were U.S. citizens. (Social Security numbers were optional for the sign-up.) Compared to the federal tax or financial aid forms I have filled out, this was a breeze. Within 15 minutes I had access to the 36 health plans available in Tarrant County.” [Fort Worth Star Telegram, 11/1/13]

**10/31/13: Associated Press: “The Scene In A City-Owned Building May Look Like A Hurricane Has Swept Through Houston: Nurses Giving Vaccine Shots, People Scurrying Around With Files And Papers And Officials Leaning Over Computers Helping Bleary-Eyed Parents Fill Out Forms As Their Children Munch On Free Pretzels. But This Is No Hurricane. Instead, It Is Houston’s Offensive To Reach More Than 1 Million People Across 600 Square Miles Who Don’t Have Health Insurance And Connect Them With The New Federal Health Insurance Program That Began Accepting Applications This Month.”** “The scene in a city-owned building may look like a hurricane has swept through Houston: Nurses giving vaccine shots, people scurrying around with files and papers and officials leaning over computers helping bleary-eyed parents fill out forms as their children munch on free pretzels. But this is no hurricane. Instead, it is Houston’s offensive to reach more than 1 million people across 600 square miles who don’t have health insurance and connect them with the new federal health insurance program that began accepting applications this month. The push is happening in one of the nation’s reddest states, an example of the gap between the vitriolic political opposition to President Barack Obama’s signature initiative in some conservative bastions and the actual response to it by local officials. “This is the same strategy we use to respond to hurricanes and public health disasters,” said Stephen Williams, director of Houston’s Department of Health and Human Services, who has organized an effort to sign up as many uninsured people as possible.” [Associated Press, 10/31/13]

**10/26/13: WFAA Dallas: “A Statewide Education And Outreach Event Focusing On The New Affordable Care Act Drew More Than 10,000 People To The Dallas Convention Center On Saturday.”** “A statewide education and outreach event focusing on the new

Affordable Care Act drew more than 10,000 people to the Dallas Convention Center on Saturday. The Be Covered Texas event was hosted by Blue Cross and Blue Shield of Texas and more than 30 community partners to provide health services and health care information...For Shundie Kizart, a working single mother with two kids, it was a no-brainer. She already has insurance for herself and her kids, but wanted to see what other options were out there. 'Get up and get the facts for yourself,' Kizart said, adding that she received one-on-one attention from health care professionals who knew more about the plan than she did.' [WFAA Dallas, 10/26/13]

**10/25/13: Reuters: "‘I See That Every Day The System Is Getting A Little Bit Easier,’ Said Daisy Morales, Vice President Of Marketing And Outreach [At Community Health Choice In Houston]."** "Community Health Choice in Houston, Texas said sales from the federal exchange had been slow. 'I see that every day the system is getting a little bit easier,' said Daisy Morales, vice president of marketing and outreach." [Reuters, 10/25/13]

**10/22/13: Texas Public Radio: "Katy Horrell, Who Received Help Enrolling In A Health Care Plan, Knew There'd Be A Few Problems. 'There's Going To Be Ups And Downs In It,' She Said. 'And I Expect That, As Long As It Doesn't Put A Slam On Me Getting My Medical Taken Care Of Because My Life Depends On It.'"** "Katy Horrell, who received help enrolling in a health care plan, knew there'd be a few problems. 'There's going to be ups and downs in it,' she said. 'And I expect that, as long as it doesn't put a slam on me getting my medical taken care of because my life depends on it.'" [Texas Public Radio, 10/22/13]

**10/12/13: Enroll America: "After Comparing Plans, [New Business Owner] Mark [Sullivan] Settled On A Bronze Option And Added Dental Insurance. He Will Receive An \$82 Per Month Subsidy, Which Will Halve The Monthly Premium He Will Pay Down To \$78."** "Mark Sullivan, 31 - Austin, TX: After working for two years in Austin's tech sector, Mark has been eager to start his own business, but the risk of high healthcare costs if he left his job made him hesitate. That's why he was eagerly anticipating the new Health Insurance Marketplace that opened under the Affordable Care Act last week. Mark got started creating an account on healthcare.gov right away. After reviewing the plans available and comparing them to his COBRA continuation coverage premium, Mark is relieved to know that he can focus on growing his new business without the cost of healthcare cutting into money that should go into the company. Despite a few glitches along the way, Mark found an insurance plan that will provide him affordable coverage starting January 1. Mark now feels confident focusing on the success of his new consulting business, saying health insurance is 'one less thing I have to think about' as he pours his time and talent into this next major career move. He also thinks the marketplace will make it possible for more people to start new businesses and wants to share his success with the larger entrepreneurial community in Austin. After comparing plans, Mark settled on a bronze option and added dental insurance. He will receive an \$82 per month subsidy, which will halve the monthly premium he will pay down to \$78. While his new startup will require a lot of personal expense early on, if profits grow faster than he projects, his subsidy may end up being a bit lower by the end of the year. That's no concern for Mark, since even without the tax credit, his total premium is still much more affordable than the private plans he had been able to find on the individual market. As Mark says, 'being able to pay back the subsidy at the end of the year would be a welcome situation,' because it would mean his investment in charting his own path is paying off.'" [Enroll America Press Release, 10/12/13]

Mr. GOODLATTE. We welcome our panel of witnesses today, and if you would all please rise, we will begin by swearing you in.

[Witnesses sworn.]

Mr. GOODLATTE. Let the record reflect that all of the witnesses responded in the affirmative. Thank you.

And I will now begin by introducing our witnesses.

Our first witness is Jonathan Turley, the Shapiro Professor of Public Interest Law at George Washington University Law School. Professor Turley is a nationally recognized legal scholar who has written extensively in areas ranging from constitutional law to legal theory to tort law. He has published over 3 dozen academic articles and over 750 articles in newspapers, including The New York Times, USA Today, and The Wall Street Journal. Professor Turley has been recognized as the second most cited law professor in the country.

Our second witness is Nicholas Rosenkranz, a professor of law at Georgetown University Law Center. Professor Rosenkranz has served and advised the Federal Government in a variety of capacities, including as a law clerk to Supreme Court Justice Anthony Kennedy, and as an attorney advisor to the Justice Department's Office of Legal Counsel. He has published numerous scholarly articles, including the "Subjects of the Constitution," which is the single most downloaded article about constitutional interpretation in the history of the social science research network.

Our third witness is Simon Lazarus, a senior counsel with the Constitutional Accountability Center. He is a member of the Administrative Conference of the United States and during his career has served as the public policy counsel for the National Senior Citizens Law Center as a partner at Powell Goldstein and as Associate Director of President Carter's White House domestic policy staff. Mr. Lazarus has written articles that have appeared in law journals, as well as publications such as The Atlantic, The Washington Post, and The New Republic.

Our final witness is Michael Cannon, the Cato Institute's Director of Health Policy Studies. He has been recognized as an influential expert on the Affordable Care Act. Mr. Cannon has appeared on ABC, CBS, CNN, and Fox News and has written articles that have been featured in numerous newspapers, including The Wall Street Journal, USA Today, and the Los Angeles Times. He is also the co-editor of a book on replacing the Affordable Care Act and the co-author of a book on health care reform.

I would like to thank all of the witnesses for their appearance today. Each of your written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help stay within the time frame, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired. And we will turn first to Professor Turley. Welcome.

**TESTIMONY OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY**

Mr. TURLEY. Thank you, Mr. Chairman, Ranking Member Conyers, Members of the Judiciary Committee. It is a great honor to

be invited to speak with you today about the meaning of the Take Care Clause. You will have to forgive my voice. I am getting over a cold, but I hope to make it through this without having a coughing fit.

This is obviously a difficult area of constitutional interpretation. As the Ranking Member pointed out, this is not the first time that we have dealt with this question.

It is also difficult for some of us who happen to agree with the President's policies, which I do. In fact, I voted for him previously.

However, in a Madisonian system, it is often more important how you do something than what you do. And the reason this is such an important hearing is that the bedrock of our Constitution remains the separation of powers. It is often misunderstood as some type of conflict between the branches. It is really a protection of liberty. It allows for issues that divide us to be cycled through a system in which factional interests can be transformed. Even though all branches are equal in the Madisonian system, the Congress is the thumping heart of that system. It is where issues that are divisive are transformed into majoritarian decisions. It is the very reason that our system has survived so well. It brings stability to the system.

Benjamin Franklin used to say or liked to say that God helps those that help themselves. In our system, the Madisonian system, the Constitution helps those branches that help themselves. It is designed to give each branch the ability of self-protection, of self-defense, and a great deal rides on the use of that power.

In my view, some of the questions we are going to talk about today are close questions, things like Internet gambling, drug enforcement. I think you can have credible arguments on the Administration side, but some of them I believe are not close questions. I believe the President has exceeded his brief.

The President is required to faithfully execute the laws. He is not required to enforce all laws equally or commit the same resources to them. But I believe the President has crossed the constitutional line in some of these areas, which I address in my testimony.

What I want to start in my opening statement is to emphasize that this is not a turf fight between politicians. Rather, this goes to the very heart of what is the Madisonian system. If a President can unilaterally change the meaning of laws in substantial ways or refuse to enforce them, it takes off line that very thing that stabilizes our system. I believe that Members will loathe the day that they allowed that to happen. This will not be our last President. There will be more Presidents who will claim the same authority.

When I teach constitutional law, I often ask my students what is the limiting principle of your argument. When that question is presented to this White House, too often it is answered in the first person, that the President is the limiting principle, or at least the limiting person. We cannot rely on that type of assurance in our system.

So the greatest danger of nonenforcement orders is not what it introduces to a tripartite system but what it takes away. What it does is it allows for these issues that divide us to be resolved unilaterally. We do not have a dialogue anymore if someone can step in and make the legislative process simply an option as opposed to



a binding stage or requirement. It is here in Congress that factional interests coalesce and convert. This is the transformative branch. It is different from the other branches. And that is what makes this so dangerous.

What Madison did is he created a type of Newtonian orbit of branches. In fact, he was very interested in Newton's physics when he wrote much of the early writings. There is a belief that these are three branches that exist in orbit. They are held together by their gravitational pull. It is a delicate balance, but it is one that protects individual liberty.

*Federalist No. 51* is one of the most cited sources for Madison's views. It is in that writing that he encouraged branches to be on guard for the encroachment of their powers. For decades, this Congress has allowed its core authority to drain away. I have written a lot about the rise of what is called the "fourth branch," this expanding number of Federal agencies that are acting increasingly independently, even defining their own jurisdiction. If that trend is to continue and the President's power is to continue to expand, Congress will be left like a marginal line on the constitutional landscape, a sad relic of what was once a tripartite system of equal branches.

There are times like this one of bitter, intractable divisions, but the Members of this body are tied by a covenant of faith, an article of faith. And it is found in Article 1 that says that all legislative powers herein granted shall be vested in the Congress of the United States. It is upon that covenant that we should not divide by parties and we should stand firmly for the separation of powers.

[The prepared statement of Mr. Turley follows:]

**Prepared Statement of Jonathan Turley, Shapiro Professor of  
Public Interest Law, George Washington University Law Center**

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the constitutional concerns raised by recent nonenforcement policies and the President's duty to faithfully execute the law of the United States.

The issue before the Committee is clearly a difficult one. It is often difficult to separate the merits of the underlying policies from the means used to achieve them. It so happens that I agree with many of the goals of the Administration in the various areas where the President has circumvented Congress. However, in the Madisonian system, it is often more important how you do things than what you do. We have long benefited from a system designed to channel and transform factional interests in the political system. When any branch encroaches upon the authority of another, it not only introduces instability into the system but leaves political issues raw and unresolved. However, to paraphrase one of Benjamin Franklin's favorite sayings, the Constitution helps those branches that help themselves. Each branch is given the tools to defend itself and the Framers assumed that they would have the ambition and institutional self-interest to use them. That assumption is now being put to the test as many members remain silent in the face of open executive encroachment by the Executive Branch.

While I believe that the White House has clearly "exceeded its brief" in these areas, this question of presidential nonenforcement has arisen periodically in our history. In the current controversy, the White House has suggested an array of arguments, citing the interpretation of statutory text, agency discretion, or other rationales to mask what is clearly a circumvention of Congress. It also appears to be relying on the expectation that no one will be able to secure standing to challenge such decisions in court. Finally, there is no question that the President as Chief Executive is allowed to set priorities of the administration and to determine the best way to enforce the law. People of good faith can clearly disagree on where the line

is drawn over the failure to fully enforce federal laws. There is ample room given to a president in setting priorities in the enforcement of laws. A president is not required to enforce all laws equally or dedicate the same resources to every federal program. Even with this ample allowance, however, I believe that President Barack Obama has crossed the constitutional line between discretionary enforcement and defiance of federal law. Congress is given the defining function of creating and amending federal law. This is more than a turf fight between politicians. The division of governmental powers is designed to protect liberty by preventing the abusive concentration of power. All citizens—Democratic or Republican or Independent—should consider the inherent danger presented by a President who can unilaterally suspend laws as a matter of presidential license.

In recent years, I have testified and written about the shift of power within our tripartite government toward a more Imperial Presidential model. Indeed, I last testified before this Committee on the assertion of President Obama that he could use the recess appointment power to circumvent the Senate during a brief intrasession recess.<sup>1</sup> While I viewed those appointments to be facially unconstitutional under the language of Article I and II (a view later shared by two federal circuits), I was equally concerned about the overall expansion of unchecked presidential authority and the relative decline of legislative power in the modern American system. The recent nonenforcement policies add a particularly menacing element to this pattern. They effectively reduce the legislative process to a series of options for presidential selection ranging from negation to full enforcement. The Framers warned us of such a system and we accept it—either by acclaim or acquiescence—at our peril.

The current claims of executive power will outlast this president and members must consider the implications of the precedent that they are now creating through inaction and silence. What if a future president decided that he or she did not like some environmental laws or anti-discrimination laws? Indeed, as discussed below, the nonenforcement policy is rarely analyzed to its natural conclusion, which leads to a fundamental shift in constitutional principles going back to *Marbury v. Madison*.<sup>2</sup> The separation of powers is the very foundation for our system; the original covenant reached by the Founding Generation and passed on to successive generations. It is that system that produces laws that can be truly said to represent the wishes of the majority of Americans. It is also the very thing that gives a president the authority to govern in the name of all Americans. Despite the fact that I once voted for President Obama, personal admiration is no substitute for the constitutional principles at stake in this controversy. When a president claims the inherent power of both legislation and enforcement, he becomes a virtual government unto himself. He is not simply posing a danger to the constitutional system; he becomes the very danger that the Constitution was designed to avoid.

# I. THE SEPARATION OF POWERS WITHIN THE TRIPARTITE SYSTEM

## A. *Factions and the Legislative Process.*

One of the greatest dangers of nonenforcement orders is not what it introduces to the tripartite system but what it takes away. The Framers created three “equal” branches but the legislative branch is the thumping heart of the Madisonian system. It is the bicameral system of Congress that serves to convert disparate factional interests into majoritarian compromises. In this sense, Congress is meant to be a transformative institution where raw, often competing interests are converted by compromise and consensus. One of the most striking aspects of the recent controversies involving presidential nonenforcement is that they involved matters that were either previously before Congress or actually under consideration when President Obama acted unilaterally.

The role of the legislative process in stabilizing the political system is key to the success of the American system. Madison saw the vulnerability of past governmental systems in the failure to address the corrosive effects of factions within a population. The factional pressures in a pluralistic nation like the United States would be unparalleled and Madison understood that these factions were the expres-

<sup>1</sup>I testified before Congress last year on the controversy surrounding these recess appointments. See *Executive Overreach: The President’s Unprecedented “Recess” Appointments Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (statement of Jonathan Turley, Professor, The George Washington University Law School) [hereinafter *Executive Overreach*]. I also address the controversy at length in two forthcoming law review articles. See Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. (forthcoming fall 2013); see also Jonathan Turley, Op-Ed., *Recess Appointments: President as Ruler*, USA TODAY, Feb. 15, 2012, at 7A.

<sup>2</sup>5 U.S. (1 Cranch) 137, 177 (1803).

sion of important political, and social, and economic interests. As Madison explained, “liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”<sup>3</sup> Congress is where these factional interests coalesce and convert in an open and deliberative process.

The point of this background discussion is that the loss caused by the circumvention of the legislative branch is not simply one branch usurping another. Rather, it is the loss of the most important function of the tripartite system in channeling factional interests and reaching resolutions on matters of great public importance.

The importance of this central function of Congress is magnified when the country faces questions upon which there is great division. Ironically, these are the same areas where presidents are most likely to issue nonenforcement orders due to opposition to the underlying legislation. Consider illegal immigration. There are few issues that are more divisive today. The immigration laws are the product of prolonged debates and deliberations over provisions ranging from public services to driver’s licenses to ICE proceedings to deportations. Many of these issues are considered in combination in comprehensive statutes where the final legislation is a multi-variable compromise by legislators. Severity in one area can at times be a trade-off for leniency in another area. Regardless of such trade-offs, the end result is by definition a majoritarian compromise that is either signed into law by a president or enacted through a veto override. The use of executive orders to circumvent federal legislation increases the shift toward the concentration of executive power in our system and the diminishment of the role of the legislative process itself. It is precisely what the Framers sought to avoid in establishing the tripartite system.

#### *B. The Royal Prerogative and the Faithful Execution of Federal Law.*

Juxtaposed against this legislative power is the Chief Executive. The Framers created a Chief Executive with a relatively short term of four years and clearly defined powers to fit within this system of shared government. Despite the recent emergence of an uber-presidency of increasingly unchecked powers, the Framers were clear that they saw such concentration of power to be a danger to liberty. Indeed, the separation of powers is first and foremost a protection of liberty from the dangers inherent in the aggregation or aggrandizement of power.<sup>4</sup> The Constitutional Convention and subsequent ratification conventions are replete with statements on the need to carefully confine the Chief Executive to enumerated powers and to specifically safeguard the powers of the legislative branch in the control of the purse and the creation of new laws.

At issue in today’s hearing is in many ways the first issue that arose in the creation of the office of a president. The Framers were intimately familiar with English history and law. The suggestion of a president immediately produced objections over the dangers of abuse and unilateral action. This debate occurred against the backdrop of over 150 years of tension with the English monarchy that can be traced to the confrontation of Sir Edward Coke and James I. That confrontation had some interesting parallels to the current debate. At issue was not the circumvention of the legislative but the judicial branch. James claimed the right to remove cases from the court for his own judgment. When various people objected, James noted “I thought law was founded upon reason, and I and others have reason as well as the judges.”<sup>5</sup> Modern presidents in nonenforcement policies claim that same basis in reason—adjusting legal authority to a more equitable or more efficient reality. However, in the case of James I, Coke objected that “natural reason” does not make for good laws or legal analysis. Rather, law is a form of “artificial reason and judgment” or “an art which required long study and experience before that a man can attain to the cognizance of it.”<sup>6</sup> Even in the face of a treason charge, Coke maintained that, “the king ought not to be under any man, but he is under God and the law.”<sup>7</sup>

The principle articulated by Coke drew the distinction between the King and the law—the latter which is made separate from the King and governs the King. It was

<sup>3</sup> THE FEDERALIST NO. 10, 78 (James Madison) (Clinton Rossiter ed., 1961).

<sup>4</sup> See generally, Turley, *Age of Regulation*, *supra*.

<sup>5</sup> 7 Sir Edward Coke, Reports 65, quoted in Roscoe Pound, *The Spirit of the Common Law* 5 (1921) at 61.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

the rejection of what has been called the “royal prerogative.”<sup>8</sup> This rejection was first seen in the state constitutions in crafting the powers of Governors and later manifested in the drafting of the new federal Constitution. For example, Thomas Jefferson wrote in 1783 with regard to the Virginia Constitution that “By Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative . . . We give them these powers only, which are necessary to execute the laws (and administer the government).”<sup>9</sup> Jefferson’s statement reflects the same Cokean distinction—now a mantra for American framers in defining the new concept of executive power.

The earliest references to executive power or the presidency in the Constitutional Convention refer to the execution of federal law—affirming the idea that the executive must enforce the law established by the legislative process. Indeed, it was the introduction of the Virginia Plan that most clearly cast this executive model.<sup>10</sup> Roger Sherman stated this most clearly in describing “the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.”<sup>11</sup> Likewise, James Wilson defended the model of an American president by assuring his colleagues that “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature.”<sup>12</sup>

Reflecting these views, and the view of Framers like Madison that the chief executive must only be given power that is “confined and defined,”<sup>13</sup> the first draft of the Take Care Clause read “it shall be his duty to provide for the due and faithful execution of the Laws.”<sup>14</sup> That language then became, with the report of the Committee of Detail, “he shall take care that the laws of the United States be duly and faithfully executed.” The final language of the Committee of Style was refined further into “The executive power shall be vested in a president of the United States of America . . . He shall take care that the laws be faithfully executed.” What is most striking about this process is how little the language actually changed—reflecting a general consensus on limiting the office to the execution— as opposed to the creation— of laws.

While the line between legislation and enforcement can become blurred, this view is generally reflective of the functions defined in Article I and Article II. The Take Care Clause is one of the most direct articulations of this division. The Clause states “[The President] shall take Care that the Laws be faithfully executed . . .” U.S. Const. art. II, § 3, cl. 4. It is one of the clearest and most important mandates in the Constitution. The Framers not only draw the distinction between making and enforcing laws, but, with the enforcement of the law, the Framers stressed that the execution of the laws created by Congress must be faithfully administered. The language combines a mandate of the execution of laws with the qualifying obligation of their faithful execution.

The constitutional obligation contained in the Take Care Clause is amplified by the oath that a president takes as a pre-condition for assuming power as Chief Executive under Section 1 of Article II. Indeed, the order of these references is interesting. In order to assume office, a president must “solemnly swear (or affirm) that [he] will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1, cl. 7. The Take Care Clause appears later in Section 3. This section happens to refer to the legislative function of Congress in stating that “from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient.” *Id.* Notably, the section affirms the right of a President to ask Congress for legislative action that he deems to be necessary. The clause then affirms the obligation of the President to faithfully execute those laws created by Congress. It is equally significant that the clause following the obligation to faithfully execute the laws is the clause allowing for the impeachment and removal of presidents.

<sup>8</sup>See Julius Goebel, Jr., *Ex Parte Clio*, 54 Colum. L. Rev. 450, 474 (1954); David Gray Adler, *The Steel Seizure Case And Inherent Presidential Power*, 19 Const. Commentary 155, 164 (2002).

<sup>9</sup>This quote is from Jefferson’s Draft of a Fundamental Constitution for Virginia. Adler, *supra*, at 164 (citing Charles Warren, *The Making of the Constitution* 177 (Harvard U. Press, 1947)).

<sup>10</sup>Max Farrand, 1 *The Records of the Federal Convention of 1787* at 62–63 (Yale U. Press, 1911) (Edmund Randolph describing a “national executive . . . with power to carry into execution the national laws . . . [and] to appoint to offices in cases not otherwise provided for.”); see also Adler, *supra*, at 164.

<sup>11</sup>Farrand, *supra*, at 65; Adler, *supra*, at 164–65.

<sup>12</sup>Farrand, 1 *Records* at 62–70; Adler, *supra*, at 165.

<sup>13</sup>*Id.* at 70.

<sup>14</sup>*Id.* at 171; Adler, *supra*, at 165.

The import of these clauses is that the President can seek legislative changes and even call Congress into session, but it remains the prerogative of Congress to decide what laws will be enacted (subject to presidential signature or veto override).

The most obvious meaning of faithful execution is that the President must apply the laws equally and without favoritism. Favoritism is clearly shown in the failure to enforce the laws against friends or political cronies. However, it can also apply more widely to favored groups or political allies. Merriam-Webster defines “faithful” as “having or showing true and constant support or loyalty.” In this controversy, this true and constant support is to the laws themselves. It is worth noting that this is not loyalty tied to the “law” in general—possibly inviting a more nuanced interpretive response to what specific laws serve or disserve the law in general. The use of the plural form encompasses the laws referenced in Article I as the product of Congress. It is those laws that the President is bound to execute faithfully under Article II.

### *C. Nonenforcement Orders and the Rise of the Fourth Branch.*

The current controversy over the nonenforcement of federal law transcends the insular issues of particular statutes or regulations. The American governmental system is being fundamentally transformed into something vastly different from the intentions of the Framers or, for that matter, the assumptions underlying the constitutional structure. As I recently discussed in print,<sup>15</sup> we are shifting from a tripartite to a quadripartite system in this age of regulation. The Administrative State that is credited with so many advances in public welfare has also served to shift the center of gravity in our system to a fourth branch of federal agencies. As a result, our carefully constructed system of checks and balances is being negated by the rise of the sprawling departments and agencies that govern with increasing autonomy and decreasing transparency. At the same time, we have seen a rapid growth of executive power, particularly since 9–11, where the President is asserting largely unchecked authority in many areas.

When the Framers created the tripartite system, our federal government was quite small. In 1790, it had just 1,000 nonmilitary workers. In 1962, there were 2,515,000 federal employees. Today, we have 2,840,000 federal workers in 15 departments, 69 agencies and 383 nonmilitary sub-agencies.<sup>16</sup> Indeed, these numbers can be themselves misleading since much federal work is now done by contractors as part of “downsizing”, but the work of the agencies has continued to expand. Moreover, technological advances have increased the reach of this workforce. With the expansion of the government has come a shift in the source of governing rules for society. Today, the vast majority of “laws” governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unnamed, unreachable bureaucrats. To give one comparative measure, one study found that in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.<sup>17</sup> Adding to this dominance are judicial rulings giving agencies heavy deference in their interpretations of laws under cases like *Chevron*. In the last term, this Supreme Court added to this insulation and authority with a ruling that agencies can determine their own jurisdictions — a power that was previously believed to rest with Congress. In his dissent in *Arlington v. FCC*, Chief Justice John Roberts warned: “It would be a bit much to describe the result as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.”

With agencies increasingly performing traditionally legislative and judicial functions,<sup>18</sup> the nonenforcement of federal law exacerbates the shift away from the origi-

<sup>15</sup>Jonathan Turley, Op-Ed., *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), at C1; see also Turley, *supra*, *Age of Regulation*, at 1542–61.

<sup>16</sup>Turley, *supra*, *Age of Regulation*, at 1533; WALTER E. VOLKOMER, *AMERICAN GOVERNMENT* 231 (11th ed. 2006) (citing Bruce D. Porter, *Parkinson’s Law Revisited: War and the Growth of American Government*, 60 PUB. INT. 50, 50 (1980)). In 1816, the federal system employed 4837 employees. Deanna Malatesta, *Evolution of the Federal Bureaucracy*, in 1 A HISTORY OF THE U.S. POLITICAL SYSTEM: IDEAS, INTERESTS, AND INSTITUTIONS 373, 380 tbl.1 (Richard A. Harris & Daniel J. Tichenor eds., 2010).

<sup>17</sup>Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009).

<sup>18</sup>As the number of federal regulations has increased, Congress has shifted the adjudication of many disputes between citizens and their government to administrative courts tied to individual agencies. The result is that a citizen is 10 times more likely to be tried by an agency than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000. Turley, *supra*, *Age of Regulation*, at 1533; Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 936 (2009).

nal calibration of the tripartite system. Federal agencies are becoming practically independent in their operations in assuming new forms of regulatory law and adjudications. The refusal to execute those laws enacted by Congress would serve to marginalize the legislative branch further and make the federal government even less dependent on or responsive to that branch.

## II. NONDEFENSE ORDERS, PRESIDENTIAL PRIORITIZATION POLICIES, AND SIGNING STATEMENTS

It is important to distinguish between the various ways that presidents can oppose laws, which can blur the line between nonenforcement and inadequate enforcement. While a president does not have authority to negate or amend laws, there is overlap between the branches in different functions. Clearly, for example, the President is allowed to set goals in the execution of laws that place certain public programs above others in priority. No area of the law has one-hundred percent enforcement. There are discretionary actions that can include staffing and resource allocations with impacts on the level of enforcement in a given area. Before delving further into the constitutionality of nonenforcement, three types of executive decisions are important to distinguish.

### A. *Nondefense Orders.*

The nondefense orders arise when presidents decide that their administrations will not defend a challenged law in court. These decisions are relatively rare and highly controversial. Even defenders acknowledge that such a decision should only be considered in circumstances where a president feels that enforcement of a law would conflict with his duty to uphold the Constitution. Indeed, one study showed that between 1974 and 1996, presidents objected to the constitutionality of roughly 250 laws but did not refuse to defend them.<sup>19</sup> Despite these reservations, Presidents Ford, Carter, Reagan, George H.W. Bush, and Clinton did not refuse to defend such laws.<sup>20</sup>

While the duty to defend would seem to be naturally subsumed under the duty to enforce, the Obama Administration draws a distinction between the two duties. Thus, it stated an intent to enforce the law while refusing to defend it. It was a curious distinction for many since continued enforcement would require that the law be defended in challenges.<sup>21</sup> The Justice Department previously adopted a narrow exception to the rule that the “courts, and not the Executive, finally to decide whether a law is constitutional” and that the nondefense of a law would impermissibly create a barrier to judicial review.<sup>22</sup> Unless the law impedes executive power, the Justice Department stated that it would defend laws so long as are not “clearly unconstitutional.” That would seem to demand more than simple disagreement with lower courts or adherence to a new or unestablished interpretation of the Constitution.

In light of the foregoing, the Administration’s decision that it would not defend the Defense of Marriage Act (DOMA) was a classic example of a nondefense policy. The timing of the decision, however, was curious given the Administration’s defense of the law for years and the President’s own public ambivalence over same-sex marriage. Thus, this was not a statute that was treated as facially invalid by this president, and it was supported (and signed into law) by another Democrat, Bill Clinton. Nevertheless, while belated, the Obama Administration announced that it could no longer in good faith support a law that it deemed unconstitutional. It notably took this position after previously enforcing the law, leading many to question a decision to abandon the law “mid-stream” without any clear advocate with standing to argue the law’s merits.<sup>23</sup>

<sup>19</sup> Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws* xiv (1998).

<sup>20</sup> In many cases, presidents used signing statements to interpret the laws compatible with their view of constitutional limits.

<sup>21</sup> Indeed, some have argued that the Administration got it wrong and that there is no duty to enforce or to defend. See Neal Devins and Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 Colum. L. Rev. 507, 508–509 (2012) (“Given President Obama’s belief that the DOMA is unconstitutional, he should neither enforce nor defend it.”).

<sup>22</sup> Recommendation that Dep’t of Justice Not Defend Constitutionality of Certain Provisions of Bankr. Amendments and Fed. Judgeship Act of 1984, 8 Op. O.L.C. 183, 194 (1984).

<sup>23</sup> Indeed, advocates of this presidential power insist that courts cannot be deemed as supreme in the interpretation of laws since “[f]ederal courts only have jurisdiction over cases or controversies, meaning that they cannot issue Article III judgments or opinions when they are not deciding cases or controversies. Yet there will be many situations, many questions, where federal courts cannot opine because there will be no case or controversy.” Devins & Prakash, *supra*, 112 Colum. L. Rev. at 530. Indeed, it is true that the executive branch must engage in interpretations as part of its enforcement of laws and, particularly with the narrowing of standing in

The decision of the Administration was equally notable in basing its nondefense decision on a position that had never been embraced by the Supreme Court. The Administration stated that “the President and [the Attorney General] have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law then, from that perspective, there is no reasonable defense of DOMA.”<sup>24</sup> While the Administration acknowledged that a lower standard of review had been applied in prior cases, it insisted that “neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.”<sup>25</sup>

While I take the same view as to gay rights, it is not a view that had ever secured a majority of the Supreme Court or even most lower courts. Thus, the Administration was refusing to defend a law based on an interpretation that had thus far remained unsupported by direct precedent. Indeed, the ultimate decision in *Windsor* was a close one with a 5–4 opinion, and the basis for the decision was more nuanced than the one indicated by the Administration. In adopting a nondefense position, the Obama Administration was establishing precedent that Presidents could refuse to defend laws based on unaccepted legal interpretations. This would lead to the question of whether a president could maintain a nondefense posture even with a legal position rejected by lower courts but never rejected by the Supreme Court.

My strongest objection was the failure of the Administration to avoid the untenable position of leaving a federal law without an advocate. That produced a standing dilemma that should never have been allowed to arise. The fact is that there are strong arguments on both sides of this litigation. While I have long been a supporter of same-sex marriage, I felt that the standing barriers created in the recent *Hollingsworth*<sup>26</sup> and *Windsor*<sup>27</sup> cases were grossly unfair to the critics of same-sex marriage and equally inimical to the legal system.<sup>28</sup> It is particularly troubling when this law was signed by a prior president who clearly viewed it (as did Congress) to be a constitutional act. The Court clearly saw the Administration’s actions as undermining both the Judicial and Legislative branches:

“if the Executive’s agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court’s primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President’s. This would undermine the clear dictate of the separation-of-powers principle that “when an Act of Congress is alleged to conflict with the Constitution, [i]t is emphatically the province and duty of the judicial department to say what the law is.” . . . Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’ enactment solely on its own initiative and without any determination from the Court.”<sup>29</sup>

While the Supreme Court resolved the standing problems in *Windsor* on prudential grounds, the untenable position created by the Administration should have been avoided by the selection of outside counsel to assume the burden of defending the law. While obviously this would have been an action taken in furtherance of the statute by the Administration, it would have allowed the Administration to convey its opposition to the statute while, in the interests of both Congress and the rule of law, ensuring that both sides were adequately represented.

Putting aside the timing and status of the DOMA defense, there remains a principled reason why a President, as well as an Attorney General, may feel that the defense of a statute is fundamentally at odds with his duty toward the Constitution.

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federal cases, many of these decisions go unchallenged. However, for those of us concerned about the rise of the Fourth Branch, this only increases the concentration of power in the Executive Branch and further undermines the balance in the tripartite system.

<sup>24</sup> <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>25</sup> *Id.*

<sup>26</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>27</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>28</sup> I have repeatedly argued to Congress that the narrow rules concerning standing are increasingly preventing worthy constitutional challenges from being heard. I have the honor of representing both Democratic and Republican members of Congress who challenged President Obama’s unilateral decision to attack Libya’s capitol and armed forces. Jonathan Turley, *Members of Congress Challenge Libyan War in Federal Court*, JONATHAN TURLEY (June 15, 2011), <http://jonathanturley.org/2011/06/15/members-of-congress-challenge-libyan-war-in-federal-court/>.

<sup>29</sup> *Windsor*, 133 S. Ct. at 2688.

For example, if Congress passed a new Sedition Act or a law establishing an official religion, a president could claim a good-faith basis for viewing the law as conflicting with his constitutional duties. While (as noted above) the law should be defended in the interests of all sides being presented for judicial review, a president can decline to directly defend the law. In such cases, the president is caught on the horns of a constitutional dilemma, and the appointment of outside counsel is appropriate to allow the presentation of arguments in favor of the law. After all, the Executive Branch has consistently opposed efforts of Congress to defend laws in court as a usurpation of Executive authority. It should not fight to both bar Congress from such arguments while declining to perform that role to the detriment of these laws.

#### *B. Prioritization Policies.*

Every President has faced accusations of slow-walking or under-enforcing laws that he has opposed. Ronald Reagan was accused of undermining a host of environmental laws through the appointment of officials like James Watt and Anne Gorsuch. Likewise, Syracuse University recently found a sharp reduction of prosecutions for financial institution fraud from over 3,000 in 1991 to just 1,365 in 2011.<sup>30</sup> That reduction in the Obama Administration is not deemed a constitutional violation since such cases are heavily imbued with prosecutorial discretion. Indeed, members of Congress often suggest that presidents should not “waste time” on enforcing some laws.<sup>31</sup>

Immigration is again an excellent example of such controversies. Modern presidents have long made deportation a lower priority for enforcement than prosecuting violent illegal immigrants and other provisions. The numbers of such deportations have varied dramatically with George W. Bush deporting a total of 2,012,539 or 251,567 per year, while Bill Clinton deported with an average annual rate of 108,705.<sup>32</sup> During the same period of time, Obama (with 395,774 per year) has actually deported more individuals per year than his predecessor.<sup>33</sup> The level of deportations, however, remains a discretionary decision of an Administration and courts tend to leave disagreements on the level of enforcement as a political question for the legislative and executive branches to resolve. As discussed below, this is in contrast to orders effectively suspending portions of federal immigration law as part of a policy change of the Administration.

#### *C. Signing Statements.*

There has already been much discussion of signing statements, particularly during the Administration of George W. Bush.<sup>34</sup> The majority of signing statements are uncontroversial in that they amplify policies or celebrate accomplishments or reaffirm objectives connected to the legislation. However, some signing statements have been used to inform agencies of an interpretation that seems at odds with the language and intent of Congress—often after an Administration has failed to get its way with the legislative branch. Signing statements may merge with nonenforcement orders when a president claims a provision is unconstitutional and unenforceable.

James Monroe is generally credited with the first signing statement.<sup>35</sup> Like many controversial practices, it started in a rather routine and harmless fashion with Monroe stressing how the law was to be administered.<sup>36</sup> Given his confrontational and at times imperial approach to the presidency, it is not surprising that the first defiant signing statement came with Andrew Jackson who did not want a road built from Detroit to Chicago. Jackson instructed his Administration to build the road but to stop before Chicago. Such statements were condemned at the time on the grounds that they violated the separation of powers and usurped the authority of the legislative branch. One of the most interesting early confrontations occurred between President John Tyler and Speaker of the House, John Quincy Adams. When Tyler wrote a signing statement rejecting certain provisions of a political apportionment

<sup>30</sup> See Criminal Prosecutions for Financial Institution Fraud Continue to Fall, TRAC Reports, Syracuse University, available at <http://trac.syr.edu/tracreports/crim/267/>.

<sup>31</sup> See, e.g., Andrew Cohen, *Sen. Leahy: Fed Shouldn't 'Waste Time' on State Marijuana Laws*, Atlantic, Sept. 3, 2013.

<sup>32</sup> 2011 Yearbook of Immigration Statistics, published by the Office of Immigration Statistics under the Department of Homeland Security (table 39).

<sup>33</sup> *Id.*

<sup>34</sup> See generally *Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?*: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 7, 9 (2007).

<sup>35</sup> T.J. Halstead, Cong. Research Serv. Report for Cong., Presidential Signing Statements: Constitutional and Institutional Implications 2 (2007), <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

<sup>36</sup> Christopher N. May, Presidential Defiance of “Unconstitutional” Laws 73 (1998).



bill, Adams rejected the signing statement as an “extraneous document” that constituted a “defacement of the public records and archives.”<sup>37</sup> Indeed, Adams was right. Such statements are extraneous and do not constitute “law.” They, however, have such an effect when a president uses them to order the disregard or effective line veto of a duly enacted law.

The most significant transformation of these statements came with Ronald Reagan. Then Attorney General Ed Meese sought to make such statements integral rather than extraneous by ensuring the West Publishing Company would print such statements with these laws as if they were a binding amendment or interpretation of the laws. The Supreme Court was viewed as undermining the authority of Congress further in *INS v. Chadha* and later cases by referring to signing statements and casually noting that the president will use such statements to decline to enforce certain objectionable provisions in laws.<sup>38</sup> Soon, presidents were adding hundreds of such statements to “Executive legislative history” accounts as if they were an addendum to legislation.

To the extent that signing statements order the nonenforcement of legislation, it raises serious constitutional questions. Some signing statements have led to later reversals as in Reagan’s dispute over the Competition in Contracting Act of 1984 or congressional reversals as in the HIV-positive personnel provision of the National Defense Authorization Act for Fiscal Year 1996 in the Clinton Administration. To the extent that these disputes are not resolved through inter-branch compromise, they should be resolved through judicial review (though, again, the dysfunctionally narrow standing rules can inhibit such review). Where the signing statements establish nonenforcement orders, we are left with a fundamental challenge to legislative authority. These confrontations can be made worse by the perfect constitutional storm of a signing statement that imposes a nonenforcement order, which in turn results in a nondefense order in litigation.

George Bush most dramatically diverted from his predecessors by issuing signing statements that “interpreted” statutes in ways that effectively amended or negated provisions. Ironically, one of the greatest critics of such statements was Barack Obama, who pledged to end the practice as unconstitutional. Yet, Obama would be criticized for not only continuing such statements but actually barring enforcement by agencies.

#### *D. Nonenforcement Orders.*

The three branches are set in a tripartite system designed to hold each in a type of Newtonian orbit. Under this system, no branch ideally has enough power to govern alone—they are forced into cooperative agreements and coexistence. Nonenforcement orders challenge this arrangement by imposing a type of presidential veto extrinsic to the legislative process. The legitimacy of such orders has long been challenged as an extraconstitutional measure.

Yet, since Thomas Jefferson, Presidents have asserted the discretion not to enforce laws that they deemed unconstitutional. Jefferson took a stand against the Sedition Act that was used for many blatant abuses against political enemies in the early Republic. Jefferson cited his oath to protect the Constitution compelling him to act to “arrest [the] execution” of the law at “every stage.”<sup>39</sup> Jefferson’s stand represented the strongest basis for nonenforcement in a law that was used against political opponents and free speech. However, many presidents object to the constitutionality of a law, often in defense of expansive views of executive power. Those presidential arguments have resulted in rejection before the Supreme Court—reaffirming objections that presidents are negating legislative authority in violation of the separation of powers.

Other presidents would follow suit, particularly in resisting claimed intrusions on executive authority. President Wilson refused to comply with a law barring his removal of postmasters without Senate approval. While three justices (including Brandeis and Holmes) dissented, the Administration prevailed in *Myers v. United States*.<sup>40</sup> However, presidents have also been wrong in such judgments. This was

<sup>37</sup> Am. Bar Ass’n, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine 7 (2006).

<sup>38</sup> In striking down the legislative veto in *Chadha*, the Court noted that “11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional.” 462 U.S. 919, 942 fn. 13 (1983).

<sup>39</sup> Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 1 THE ADAMS-JEFFERSON LETTERS 274, 275–76 (Lester J. Cappon ed., 1959); see also Saikrishna Bangalore Prakash, *The Executive’s Duty To Disregard Unconstitutional Laws*, 96 Geo. L.J. 1613 (2008).

<sup>40</sup> 272 U.S. 52 (1926).

the case with Gerald Ford, who refused to enforce the 1974 amendment to the Federal Election Campaign Act of 1971, which placed legal limits on the campaign contributions. Ford vetoed the law on first amendment grounds, but Congress overrode the veto. Ford then refused to enforce those provisions<sup>41</sup> and then Robert Bork argued against the FECA provisions before the Court. However, the Court rejected Ford's arguments on that part of the law.<sup>42</sup>

Likewise, Ronald Reagan refused to execute the Independent Counsel law on the grounds of separation of powers—an ironic position given his own refusal to respect a duly enacted law of Congress. The Supreme Court ruled 7–1 that Reagan was wrong in *Morrison v. Olson*.<sup>43</sup> In the same fashion, George H. W. Bush opposed affirmative action policies of the FCC only to be rejected in *Metro Broadcasting v. FCC*.<sup>44</sup> While this was in turn overruled in *Adarand Constructors, Inc. v. Peña*,<sup>45</sup> it was clearly a close constitutional question. For presidents to block enforcement of a law creates uncertainty as to the legitimacy and finality of enactments.

I cannot agree with Abner Mikva who claimed as White House Counsel for Clinton that it is “uncontroversial” that “the President may appropriately decline to enforce a statute that he views as unconstitutional.”<sup>46</sup> Mikva cites virtually nothing in terms of the text or intent of the Framers. Rather, he cites first and foremost the silence of the Court in cases like *Myers* where “the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute.”<sup>47</sup> This “implicit[] vindication” is cited by Mikva as proof of the authority to block the enforcement of federal statutes.<sup>48</sup>

There has of course been obvious controversy over the right of a president to refuse to execute federal laws in light of express language requiring his faithful enforcement of such laws. Moreover, the allowance for nonenforcement orders undermines the express process of legislation detailed in Article I and Article II. Thus, a president like Clinton can sign the National Defense Authorization Act for Fiscal Year 1996, forego a constitutional veto, and then declare a constructive post-enactment veto in a signing statement. While I happened to agree with Clinton on his opposition of the mandatory discharge of HIV-positive service members, a conscious decision was made to sign the legislation under the expectation that he could achieve the same effect of a veto through a nonenforcement order. Of course, it did not have the same effect constitutionally. An actual veto would have resulted in additional congressional debate and a separate vote to override the veto. The non-enforcement order made the legislative process meaningless by negating the provisions in a post-enactment order.

### III. NONENFORCEMENT POLICIES UNDER THE OBAMA ADMINISTRATION

From Internet gambling to educational waivers to immigration deportations to health care decisions, the Obama Administration has been unilaterally ordering major changes in federal law with the notable exclusion of Congress. Many of these changes have been defended as discretionary acts or mere interpretations of existing law. However, they fit an undeniable pattern of circumventing Congress in the creation of new major standards, exceptions, or outright nullifications. What is most striking about these areas is that they are precisely the type of controversial questions designed for the open and deliberative legislative process. The unilateral imposition of new rules robs the system of its stabilizing characteristics in dealing with factional divisions. While Attorney General Eric Holder has recognized that the judicial branch is “the final arbiter of . . . constitutional claims,”<sup>49</sup> he appears less committed to the concept of the legislative branch's inherent authority. The classic cir-

<sup>41</sup> Gerald Ford, Statement on the Federal Election Campaign Act Amendments of 1974 (Oct. 15, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4464#axzz2gIvcVm5z>.

<sup>42</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>43</sup> 487 U.S. 654 (1988).

<sup>44</sup> 497 U.S. 547 (1990).

<sup>45</sup> 515 U.S. 200 (1995).

<sup>46</sup> Memorandum for the Honorable Abner J. Mikva, Counsel to the President, Nov. 2, 1994 (found at <http://www.justice.gov/olc/nonexc.htm>).

<sup>47</sup> *Id.*

<sup>48</sup> Not surprisingly, there has been a series of opinions out of the Executive Branch supporting a president's right to refuse to execute laws. For example, Attorney General Civiletti insisted that “*Myers* holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts.” *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980).

<sup>49</sup> Letter from Eric H. Holder, Jr., Att'y Gen. of the United States, to Hon. John H. Boehner, Speaker of the House (Feb. 23, 2011) at 5.

cumvention of the Faithful Executive Clause is to say that it necessarily is limited to only constitutional laws. However, this argument only begs the question of who determines the unconstitutionality of a law. If it is left to a President, any such law could be claimed as presumptively unconstitutional. Indeed, if a President views a law as unconstitutional, it is not clear why the President could not still refuse to enforce it. This inherent power is often reinforced by reference to the President's oath to "preserve, protect, and defend" the Constitution—making the enforcement of a law deemed unconstitutional a violation of his oath—the Jeffersonian position on the Sedition Act.

Some academics posit that each branch has an interpretive function and that the President need not yield to the rivaling interpretation of Congress or even courts. As was recently argued in one law review, "the Constitution nowhere anoints any entity or branch as the final arbiter of the meaning of the laws or the Constitution."<sup>50</sup> This view, however, challenges the stability achieved after *Marbury v. Madison*<sup>51</sup> since it necessarily leads to a position that "[t]he Constitution never marks the Supreme Court supreme in its exposition of the Constitution over Presidents, Congress, the states, or the people."<sup>52</sup> This is a long-standing debate that is not without support given the absence of a clear statement in Article III making the Supreme Court the final arbiter in such disputes.<sup>53</sup> However, regardless of the debate over Chief Justice Marshall's basis for his holding, *Marbur* established a key stabilizing element by bringing finality to interpretive debates, particularly over controversies over the separation of powers. While the Administration avoids acknowledging the implications of its policy, it does inevitably challenge this foundational principle of judicial authority. The result is a view that not only allows the circumvention of the legislative powers but the negation of judicial review. That leaves such disputes to a matter of political strength and reduces the tripartite system to something akin to a continual game of chicken between branches.

While political divisions would normally be a reason to leave a matter to the legislative process to resolve, it is increasingly being cited as a rationale for circumventing Congress. Thus, citing gridlock and the failure to correct the law, President Obama has granted widespread waivers to states under the No Child Left Behind Act, effectively nullifying the law in the view of critics.<sup>54</sup> This has been denounced as a circumvention of Congress with the creation of new criteria or conditions by the Administration for schools to receive the waivers. This new system is entirely the product of an intrabranched process in circumvention of Congress. Likewise, the Administration effectively flipped the interpretation of the Wire Act, 18 U.S.C. § 1084, from years of prohibiting Internet gambling to a limited bar just on sports betting.<sup>55</sup> The interpretation effectively flipped the long-standing meaning of the federal law—an interpretation favored by many states and lobbyists in the industry. After years of maintaining a consistent interpretation, the 180 degree change transformed the Act into a vastly different law that potentially allowed billions of dollars' worth of gambling operations on the Internet. While defensible as an interpretative function, it was a radical change made without congressional hearings or debate.

A different rationale was used for delaying enforcement of the employer mandate set by Congress in the Affordable Care Act. Once again, this remains one of the most important and divisive questions facing the political system. Yet, the Administration cited deference to agencies in implementing regulations and establishing standards for tax and other provisions. Despite having four years to implement the law and the statutorily-set deadline, the Administration insisted that Congress cannot hold agencies to such schedules. The law itself unambiguously sets January 1, 2014 as the critical date<sup>56</sup>—a matter of considerable debate within Congress during

<sup>50</sup> Devins & Prakash, *supra*, 112 Colum. L. Rev. at 526.

<sup>51</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>52</sup> *Id.* at 529.

<sup>53</sup> *Id.* ("In sum, to imagine that the Constitution marks the Supreme Court as supreme in its exposition of the Constitution and laws of the United States, one has to believe two implausible propositions. One has to presume that a Constitution that never grants the Supreme Court a general power to decide all legal questions nonetheless cedes the Court a power to definitively answer such questions in some instances. And one has to discover, buried deep within the Constitution's interstices, an interbranch supremacy on constitutional and legal interpretation even though the Constitution contains nary a word hinting at such dominance.")

<sup>54</sup> Motoko Rich, "No Child" Law Whittled Down By The White House, New York Times, July 6, 2012.

<sup>55</sup> Nathan Vardi, Department of Justice Flip-Flops On Internet Gambling, Forbes, Dec. 12, 2011.

<sup>56</sup> This date applies to the Employer Mandate (26 U.S.C. § 4980H) and the Individual Mandate (*id.* § 5000A). Pub. L. No. 111–148, 124 Stat. 119.

deliberations. There is no express power given to change that date. Yet, Mark J. Mazur, the Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, insisted that such mandatory dates can be ignored by the Administration, which will unilaterally decide such questions.<sup>57</sup> It is another example of the new independence of the “Fourth Branch” and how specific mandates can now be disregarded in the haze of agency deference. The Congress could not have been more clear as to the activation date for the law, but the position of the Administration would make such provisions merely advisory and subject to the agreement of the President.

The Administration’s basis for negating statutory provisions lost even the pretense of reasoned authority in the immigration area.<sup>58</sup> There has long been a general consensus that a president cannot refuse to enforce a law that is considered constitutionally sound. Thus, in his general support for nonenforcement orders, former Attorney General Benjamin Civiletti acknowledged that “[t]he President has no ‘dispensing power,’” meaning that the President and his subordinates “may not lawfully defy an Act of Congress if the Act is constitutional . . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot.”<sup>59</sup> Yet, in June 2012, President Obama appeared to exercise precisely this type of “dispensing power” in issuing an order to federal agencies that the Administration would no longer deport individuals who came to this country illegally as children despite the fact that federal law mandates such deportation. In disregarding the statutory language, the Administration rolled out a new alternative policy that individuals can qualify for “deferred action” if they had come to the country before the age of 16, have no criminal history, resided in the U.S. for at least five consecutive years, and are either a student or have already graduated from high school, or earned an equivalent GED, or served in the military. Yet, this new, detailed system is the product not of Congress but the internal deliberations of a federal agency. While claimed to simply be an act of prosecutorial discretion,<sup>60</sup> it constitutes a new and alternative immigration process for these individuals.

The Administration again circumvented Congress in August of this year with the announcement that deportation would no longer occur for any primary provider for any minor child or the parent or guardian of a child who is a U.S. citizen or legal permanent resident. Once again, it is not clear what Congress could do to counter such claims of discretion any more than it could set the date for the implementation of the ACA. The federal law mandates deportation for individuals in the country illegally. While prosecutorial discretion has been cited in individual case decisions, the Administration was using it to nullify the application of federal law to hundreds of thousands, if not millions of individuals. Once again, one’s personal view of the merits of such an exception should not be the focus, or even a part, of the analysis. In ordering this blanket exception, President Obama was nullifying part of a law that he simply disagreed with. There is no claim of unconstitutionality. It is a raw example of the use of a “dispensing power” over federal law. It is difficult to discern any definition of the faithful execution of the laws that would include the blanket suspension or nullification of key provisions. What the immigration order reflects is a policy disagreement with Congress. However, the time and place for such disagreements is found in the legislative process before enactment. If a president can claim sweeping discretion to suspend key federal laws, the entire legislative process becomes little more than a pretense. What is most striking is the willingness of some to accept this transparent effort to rewrite the immigration law after the failure to pass the DREAM Act containing some of the same reforms.

A few weeks ago, President Obama again invoked his inherent power in declaring that individuals with pre-existing policies could retain those policies for a year de-

<sup>57</sup> Mark J. Mazur, Continuing to Implement the ACA in a Careful, Thoughtful Manner, U.S. Department of the Treasury, July 2, 2013 (available at <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>).

<sup>58</sup> There was also an immigration component of the controversy over DOMA. Peter Baker, *For Obama, Tricky Balancing Act in Enforcing Defense of Marriage Act*, New York Times (Mar. 28, 2013). Before the ruling of the Supreme Court striking down DOMA, the Department of Homeland Security announced that it would no longer enforce DOMA in its immigration decision. In August 2011, Obama’s DHS announced it would no longer deport the noncitizen spouses of gay Americans in conflict with DOMA.

<sup>59</sup> The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) (opinion of Attorney General Civiletti).

<sup>60</sup> Memorandum of Janet Napolitano, Secretary of Homeland Security, June 15, 2012, (available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>).

spite the fact that they do not conform with the requirements of the ACA.<sup>61</sup> The ACA expressly sets the date for compliance that penalizes non-exempt individuals who do not maintain “minimum essential” health insurance coverage.<sup>62</sup> Those non-compliant individuals are subject to a “[s]hared responsibility payment.”<sup>63</sup> By saying that states can allow individuals to remain non-compliant after the statutory deadline, President Obama inserted a constructive exemption that would have been the subject of intense political debate at the time of the deliberations.

Notably, the unilateral change occurred when legislation addressing this issue was being debated in Congress. Moreover, this change was made after an outcry over what many viewed as the central selling point of the President’s during the debate over the ACA: suggesting that, if people liked their current policies, they would be allowed to keep them. After securing passage of the ACA, however, on a thin vote margin, many accused the President of a bait-and-switch when millions lost their policies. I will leave others to work through the merits of that controversy. For my purposes, I am only interested in the fact that a key issue discussed during the debate over the legislation was unilaterally altered after passage. This is an obviously important part of the debate. The law does not expressly give the President the authority to waive the application of the provisions for selected groups. To the extent that the President was claiming that he had the authority to amend the law in this way, I fail again to see the legal basis for such authority.

Notably, the unilateral changes made to laws like the ACA are not done (as with Jefferson’s refusal to enforce the Sedition Act) in defiance of an act viewed as unconstitutional and abusive. Rather, President Obama has invoked a far broader authority to tailor laws based on his judgment and discretion. This may be done ostensibly to “improve” the law as with the one-year waiver for individual policies or to mitigate the hardship of a law as with the immigration law. These happen to be areas of great political division in the country as well as substantial opposition to the President’s policies in Congress. Many applauded the President’s transcending politics by ordering such unilateral action without considering the implications of such inherent authority for the system as a whole.

Once again, it is important to divorce the subject of such legislation or the identity of the president from the constitutional analysis. The circumvention of the legislative process not only undermines the authority of this branch but destabilizes the tripartite system as a whole. If President Obama can achieve the same result of legislation by executive fiat, future presidents could do the same in negating environmental or discrimination or consumer protection laws. Such practices further invest the Administrative State with a degree of insularity and independence that poses an obvious danger to liberty interests protected by divided government. This danger is made all the more menacing by the clear assumption by the Executive Branch that artificially narrow standing rules will insulate the orders from judicial scrutiny and relief. With Congress so marginalized and courts so passive, the Fourth Branch threatens to become a government unto itself for all practical purposes.

#### IV. CONCLUSION

In Federalist No. 51, James Madison explained the essence of the separation of powers—and the expected defense of each branch of its constitutional prerogatives and privileges:

“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.”

A provision was once made for the defense of this branch against the type of “encroachments” discussed in this hearing. It was found in the power of Congress to establish federal law and the obligation of the Executive Branch to faithfully execute those laws. For decades, however, Congress has allowed its core authority to drain into a fourth branch of federal agencies with increasing insularity and independence. It has left Congress intact but inconsequential in some disputes. If this trend continues unabated, Congress will be left like some Maginot Line on the constitutional landscape—a sad relic of a once tripartite system of equal branches.

<sup>61</sup>Juliet Eilperin, Amy Goldstein and Lena H. Sun, *Obama Announces Change To Address Health Insurance Cancellations*, Wash. Post, Nov. 14, 2013.

<sup>62</sup>26 U.S.C. § 5000A.

<sup>63</sup>26 U.S.C. § 5000A(b).

There remain legitimate questions over when a President can refuse to defend or enforce a statute and whether the former duty is a subset of the latter duty. As an academic deeply concerned over the concentration of power under the modern presidency, I tend to minimize such authority in favor of a more formalist division of powers.<sup>64</sup> Functionalists take a clearly more fluid approach to such powers. However, I do not view the recent controversies as “close questions.” The actions of the Obama Administration challenge core principles of the separation of powers and lack meaningful limiting principles for future executive orders.

Clearly, these are times of bitter and intractable divisions between the parties. It is not the first time such divisions have emerged in Congress. However, Madison and others believed that petty partisanship would ultimately yield to common institutional interests when faced with the “danger of attack.” After all, members have a common article of faith. It is Article I of the Constitution and the words “All legislative powers herein granted shall be vested in a Congress of the United States.”

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Mr. GOODLATTE. Mr. Rosenkranz, welcome.

**TESTIMONY OF NICHOLAS QUINN ROSENKRANZ, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER AND SENIOR FELLOW IN CONSTITUTIONAL STUDIES, CATO INSTITUTE**

Mr. ROSENKRANZ. Thank you, Mr. Chairman, Representative Conyers, Members of the Committee. I thank you for the opportunity to express my views about the President’s constitutional duty to take care that the laws be faithfully executed.

So to speak about the Take Care Clause, I want to associate myself with Professor Turley’s opening statements. I quite agree with all of his remarks.

I would like to just draw the Committee’s attention to the text of the clause. It is always best to begin by parsing the actual words.

So, first, notice that this clause is not a grant of power actually but the imposition of a duty. “The President shall take Care.” This is not optional. It is mandatory.

Second, note that the duty is personal. The execution of the laws may be delegated to other officers, but the duty to take care that the laws be faithfully executed—that is personal. That is the President’s duty alone.

Third, notice that the President is not required to take care that the laws be completely executed. That would be impossible given finite resources. The President does have power to make enforcement choices. However, he must make them faithfully.

Finally, it is important to remember the historical context of the clause. English kings had claimed the power to suspend laws unilaterally, but the Framers expressly rejected that practice. Here, the executive would be obliged to take care that the laws be faithfully executed.

So with these principles in mind, it is possible to view some recent controversies through this precise proper constitutional lens. For this purpose, I am going to focus on three examples: the President’s unilateral decision to suspend certain provisions of the Affordable Care Act; the President’s unilateral abridgement of the Immigration and Nationality Act; and on the IRS’s targeting of the President’s political adversaries.

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<sup>64</sup> See generally Turley, *Age of Regulation*, *supra*.

So, first, the Obamacare suspension. On July 2nd, 2013, just before the long weekend, the Obama administration announced via blog post that the President would unilaterally suspend the employer mandate of Obamacare, notwithstanding the unambiguous command of the law. The statute is perfectly clear. It provides that these provisions become effective on January 1st, 2014. The blog post makes no mention of the statutory deadline.

This raises the question of what it means to take care that the laws be faithfully executed. Certainly the adverb “faithfully” gives the President broad discretion about how to best deploy his executive resources, and the scope of that discretion can be the subject of legitimate debate. But this was not a mere calibration of executive resources. This is wholesale suspension of law in the teeth of a clear statutory command to the contrary. Whatever it may mean to take care that the laws be faithfully executed, it simply cannot mean declining to execute a law at all.

Now, the President’s remarks on this issue were quite striking. A few months ago, he said he would actually prefer to simply call up the Speaker of the House to request a change in this law that would have achieved the desired delay, but the truth is he would not have needed to pick up the phone. The House actually had already passed the Authority for Mandate Delay Act, but the President, far from welcoming this legislative change, actually threatened to veto it. So this seems almost like a willful violation of the Take Care Clause.

The second example, the Immigration and Nationality Act suspension, which the Chairman mentioned. I will just mention briefly what is striking about this is the President’s decision to enforce the immigration laws as though the DREAM Act had been enacted when in fact it has not. So in this case, it is almost a mirror of the other case. Rather than declining to comply with a duly enacted statute, the President is complying meticulously but with a bill that never became a law. Congress has repeatedly considered a statute called the DREAM Act. The President favors this act. Congress repeatedly declined to pass it. So the President has simply announced that he would enforce the Immigration and Nationality Act as though the DREAM Act had been enacted.

To put the point another way, the President’s duty is to “take Care that the Laws be faithfully executed,” “Laws,” capital L, not those bills which fail to become law like the DREAM Act.

Finally, I will just briefly mention the IRS targeting. If the adverb “faithfully” means anything, I would say that it means nondiscriminatorily. That is, the President cannot enforce the laws in a discriminatory manner. And the story of the IRS targeting is actually the application of the tax laws to the President’s political enemies in a discriminatory way. This is perhaps the single most troubling type of enforcement discrimination, and so in a way perhaps the most troubling violation of the President’s obligation to take care that the laws be faithfully executed.

Thank you.

[The prepared statement of Mr. Rosenkranz follows:]

**Prepared Statement of Nicholas Quinn Rosenkranz, Professor of Law,  
Georgetown University Law Center, and Senior Fellow in Constitutional  
Studies, The Cato Institute, Washington, DC**

Mr. Chairman, Representative Conyers, Members of the Committee: I thank you for the opportunity to express my views about the President's constitutional duty to "take Care that the Laws be faithfully executed."<sup>1</sup>

This is a timely and important hearing, because many of the legal controversies of the day implicate this Presidential duty. In areas as important and diverse as healthcare, immigration, nuclear waste storage, tax enforcement, military action, and foreign aid, there has been an inchoate sense that the Administration has overstepped its authority. But the criticism has generally been issue-specific, and it has often conflated policy objections with constitutional objections. There has been very little systematic analysis of this behavior *as a pattern*. And more to the point, there has been very little analysis of the particular constitutional clause at issue.

The relevant clause of the Constitution, which should be the lodestar of this discussion, is the Take Care Clause: "*The President . . . shall take Care that the Laws be faithfully executed.*"<sup>2</sup> To put these recent controversies in constitutional context, it is essential to understand the meaning and purpose of this Clause. As always, it is best to begin by parsing the constitutional text.

First, notice that this Clause does not grant power but rather imposes a duty: "The President . . . shall take Care . . ."<sup>3</sup> This is not optional; it is mandatory. Second, note that the duty is personal. Execution of the laws may be delegated, but the duty to "take Care that the Laws be faithfully executed"<sup>4</sup> is the President's alone. Third, notice that the President is not required to take care that the laws be "completely" executed; that would be impossible given finite resources. The President does have power to make enforcement choices—however, he must make them "faithfully." Finally, it is important to remember the historical context of the clause: English kings had claimed the power to suspend laws unilaterally,<sup>5</sup> but the Framers expressly rejected that practice. Here, the executive would be obliged to "take Care that the Laws be faithfully executed."<sup>6</sup>

With these principles in mind, it is possible to view recent controversies through the proper constitutional lens. For this purpose, I shall focus on three recent examples—though, sadly, there are many others that one could choose. I shall focus on the President's unilateral decision to suspend certain provisions of the Affordable Care Act, on the President's unilateral abridgement of the Immigration and Nationality Act, and on the IRS's targeting of the President's political adversaries.

#### I. OBAMACARE SUSPENSION

On July 2, 2013, just before the long weekend, the Obama Administration announced via blog post that the President would unilaterally suspend the employer mandate of ObamaCare<sup>7</sup>—notwithstanding the unambiguous command of the law. The statute is perfectly clear: It provides that these provisions become effective on January 1, 2014.<sup>8</sup> The blog post—written under the breezy Orwellian title "Continuing to Implement the ACA in a Careful, Thoughtful Manner"—makes no mention of the statutory deadline.<sup>9</sup>

This blog post raises the question of what it means to "take Care that the Laws be faithfully executed." Certainly, the adverb "faithfully" gives the President broad discretion about how best to deploy executive resources and how best to execute the laws. And the precise scope of this discretion may be the subject of legitimate debate. But this breathtaking blog post was not a mere exercise of prosecutorial dis-

<sup>1</sup> U.S. CONST. art. II, § 3.

<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> *Id.* (emphasis added).

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED, 302–03 (1st ed. 1908 & reprint 1919).

<sup>6</sup> U.S. CONST. art. II, § 3. See also Michael W. McConnell, *Op-Ed: Obama Suspends the Law*, WALL ST. J. (July 8, 2013), <http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html>.

<sup>7</sup> Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEPT OF THE TREASURY (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>. The Obama Administration suspended implementation of 26 U.S.C. § 6055, 26 U.S.C. § 6056, and 26 U.S.C. § 4980H.

<sup>8</sup> The Patient Protection and Affordable Care Act, Pub.L. 111–148, § 1502(e), 124 Stat. 119, 252 (March 23, 2010) ("The amendments made by this section shall apply to calendar years beginning after 2013."); *id.* § 1513(d), 124 Stat. at 256 ("The amendments made by this section shall apply to months beginning after December 31, 2013.").

<sup>9</sup> See Mazur, *supra* note 7.



cretion or a necessary calibration of executive resources. This was a wholesale suspension of law, in the teeth of a clear statutory command to the contrary. Whatever it may mean to “Take Care that the Laws be faithfully executed,” it simply cannot mean declining to execute a law at all.

As if the suspension weren’t enough, President Obama’s comments about it on August 9, 2013—claiming that “the normal thing [he] would prefer to do” is seek a “change to the law”<sup>10</sup>—added insult to constitutional injury. Indeed, the President seemed annoyed when *The New York Times* dared to ask him the constitutional question.<sup>11</sup> As for Republican congressmen who questioned his authority, Mr. Obama said only: “I’m not concerned about their opinions—very few of them, by the way, are lawyers, much less constitutional lawyers.”<sup>12</sup> Mr. Obama made no mention of, for example, Iowa Sen. Tom Harkin—a Democrat, a lawyer and one of the authors of ObamaCare—who asked exactly the right question: “This was the law. How can they change the law?”<sup>13</sup> Senator Harkin’s point, of course, is that a change like this is inherently legislative; it requires an amendment to the statute itself.

But the President has been distinctly ambivalent about any such amendment. A few months ago, he said that he would like to “simply call up the Speaker” of the House to request a “change to the law” that would achieve his desired delay.<sup>14</sup> But the truth, as the President knows, is that he wouldn’t even need to pick up the phone: On July 17, 2013, the House of Representatives passed the Authority for Mandate Delay Act (with 229 Republicans and 35 Democrats voting in favor).<sup>15</sup> This would have authorized President Obama’s desired suspension of the law.<sup>16</sup>

But President Obama did not actually welcome this congressional ratification. To the contrary, this bill—which stood to fix the constitutional problem that he himself had created—the President deemed “unnecessary.”<sup>17</sup> Indeed, he actually threatened to veto it.<sup>18</sup> In this case, it appeared that the President would actually prefer to flout the law as written, rather than support a statutory change that would achieve his desired result. This seems an almost willful violation of the Take Care Clause.

## II. IMMIGRATION AND NATIONALITY ACT SUSPENSION

The second example, immigration, is almost an exact mirror of the first. In the ObamaCare context, the President suspended an Act of Congress—a statute that was duly passed by both Houses of Congress, and which he himself had signed into law. In the immigration context, the situation is the opposite. Rather than declining to comply with a duly enacted statute, the President is complying meticulously—with a bill that never became a law.

Congress has repeatedly considered a statute called the DREAM Act, which would exempt a broad category of aliens from the Immigration and Nationality Act (INA).<sup>19</sup> The President favored this Act, but Congress repeatedly declined to pass it.<sup>20</sup> So, on June 15, 2012, the President announced that he would simply not en-

<sup>10</sup> President Barack Obama, Remarks by the President in a Press Conference, (Aug. 9, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference>.

<sup>11</sup> See Jackie Calmes & Michael D. Shear, *Interview with President Obama*, N.Y. TIMES (July 27, 2013), [http://www.nytimes.com/2013/07/28/us/politics/interview-with-president-obama.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/28/us/politics/interview-with-president-obama.html?pagewanted=all&_r=0).

<sup>12</sup> *Id.*

<sup>13</sup> Jonathan Weisman & Robert Pear, *Seeing Opening, House G.O.P. Pushes Delay on Individual Mandate in Health Law*, N.Y. TIMES (July 9, 2013), <http://www.nytimes.com/2013/07/10/us/politics/house-gop-pushes-delay-on-individual-mandate-in-health-law.html>.

<sup>14</sup> President Barack Obama, Remarks by the President in a Press Conference, (Aug. 9, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference>.

<sup>15</sup> See Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013). For final vote results for H.R. 2667, see <http://clerk.house.gov/evs/2013/roll361.xml>.

<sup>16</sup> See Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013).

<sup>17</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, (July 16, 2013), [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2668r\\_20130716.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2668r_20130716.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> See Elisha Barron, *The Development, Relief, and Education for Alien Minors (Dream) Act*, 48 HARV. J. ON LEGIS. 623, 633 (2011); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–784, 789 (2013).

<sup>20</sup> The Dream Act of 2011 did not move past the committee stage in either the House or the Senate. See Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Congress (2011); Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Congress (2011).

force the INA against the precise category of aliens described in the DREAM Act.<sup>21</sup> He announced, in effect, that he would behave as though the DREAM Act had been enacted into law, though it had not.<sup>22</sup>

Once again, the President does have broad prosecutorial discretion and broad discretion to husband executive resources. But in this case, it is quite clear that the President is not merely trying to conserve resources. After all, his Solicitor General recently went to the Supreme Court to forbid Arizona from helping to enforce the INA.<sup>23</sup> And exempting as many as 1.76 million people from the immigration laws goes far beyond any traditional conception of prosecutorial discretion.<sup>24</sup> More to the point, this exemption has a distinctly legislative character. It is not a decision, in a particular case, that enforcement is not worth the resources; rather it is a blanket policy which exactly mirrors a statute that Congress declined to pass.<sup>25</sup> To put the point another way, the President shall “take Care that the *Laws*”—capital “L”—“be faithfully executed”—not those bills which fail to become law. Here, in effect, the President is faithfully executing the DREAM Act, which is not law at all, rather than the Immigration and Nationality Act, which is supreme law of the land. The President cannot enact the DREAM Act unilaterally, and he cannot evade Article I, section 7,<sup>26</sup> by pretending that it passed when it did not.

Indeed, the President himself made this exact point, eloquently, only 20 months ago:

America is a nation of laws, which means I, as the President, am obligated to enforce the law. . . . With respect to the notion that I can just suspend deportations through executive order, that’s just not the case, because there are laws on the books that Congress has passed . . . There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.<sup>27</sup>

And just last week, in response to a heckler, the President expressly denied that he has “a power to stop deportation for all undocumented immigrants in this country.”<sup>28</sup> He reiterated:

[W]e’re also a nation of laws. That’s part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I’m proposing is the harder path, which is to use our democratic processes to achieve the same goal that you want to achieve.<sup>29</sup>

What the President did not explain is how his current immigration policy is consistent with that principle.

<sup>21</sup> President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

<sup>22</sup> See *id.*; Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>23</sup> See Brief for Respondent United States at 26, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11–182). The Solicitor General argued that “Arizona’s attempt to punish violations of federal law intrudes on exclusive federal authority.”

<sup>24</sup> JEANNE BATALOVA & MICHELLE MITTELSTADT, MIGRATION POLICY INST., RELIEF FROM DEPORTATION: DEMOGRAPHIC PROFILE OF THE DREAMERS POTENTIALLY ELIGIBLE UNDER THE DEFERRED ACTION POLICY 1 (2012), available at [http://www.migrationpolicy.org/pubs/FS24\\_deferredaction.pdf](http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf).

<sup>25</sup> See Memorandum from Janet Napolitano, *supra* note 22. See also *In re Aiken Cnty.*, 725 F.3d 255 (D.C. Cir. 2013) (Kavanaugh, J.) (“[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.”).

<sup>26</sup> U.S. CONST. art. I, § 7 (requiring bicameralism and presentment for a bill to become a law).

<sup>27</sup> President Barack Obama, Remarks by the President at Univision Town Hall (Mar. 28, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall>.

<sup>28</sup> President Barack Obama, Remarks by the President on Immigration Reform—San Francisco, CA (Nov. 25, 2013), <http://www.whitehouse.gov/the-press-office/2013/11/25/remarks-president-immigration-reform-san-francisco-ca>.

<sup>29</sup> *Id.*

## III. IRS TARGETING

The third example is troubling in a different way. As is now well known, the IRS subjected Tea Party organizations to Kafkaesque scrutiny and delay, particularly in the run-up to the last election. A few months ago, a House Oversight Committee hearing revealed that the IRS Chief Counsel's Office had played a key role.<sup>30</sup> The Committee rightly zeroed in on this fact, because the Chief Counsel is one of only two political appointees at the IRS,<sup>31</sup> appointed by President Obama<sup>32</sup> and confirmed by the Senate.<sup>33</sup> But what was missing from the hearing—and what has been missing from the commentary throughout—is the constitutional context of this scandal.

The President has, of course, been at pains to distance himself from this scandal. But, again, recall that the duty to “take Care” is personal. Execution of the laws may be delegated; indeed, the Clause clearly contemplates that other officers—like the IRS Chief Counsel—will do the actual executing. But the duty to “*take Care* that the Laws be faithfully executed” is the President's alone. For this reason, what the President knew and when he knew it is, in a certain sense, beside the point; the right question is what he *should* have known. It will not do for the President to say (erroneously) that the IRS is an “independent agency” or to say (implausibly) that he learned about IRS targeting “from the same news reports” as the rest of us.<sup>34</sup> Not knowing what an executive agency is up to—let alone not knowing that the IRS is, in fact, a bureau of an executive agency that answers to the President—is not taking care that the laws be faithfully executed. If the President was negligent in his supervision of the IRS (or somehow unaware that it was subject to his supervision), then he failed in his duty to take care.

Now, again, it is true that the President is not required to take care that the laws be “completely” executed; that would be impossible given finite resources. The President does have power to make enforcement choices—however, he must make them “faithfully.” If the President lacks the resources to prosecute all bank robbers, he may choose to prosecute only the violent bank robbers; but he cannot choose to prosecute only the Catholic bank robbers.<sup>35</sup> Invidious discrimination is not faithful execution.

Discriminatory enforcement on the basis of religion would have horrified the Framers of the Constitution. But there is one kind of discrimination that would have worried them even more—the one kind that could undermine the entire constitutional structure: political discrimination. *The single most corrosive thing that can happen in a democracy is for incumbents to use the levers of power to stifle their critics and entrench themselves.*<sup>36</sup> This is devastating to a democracy, because it casts doubt on the legitimacy of all that follows. Ensuring that this does not happen is perhaps the single most important imperative of the President's duty to take care that the laws be faithfully executed. If he gives only one instruction to his political appointees, it should be this: *do not discriminate on the basis of politics in your execution of the laws.*

This, sadly, is the gravamen of the IRS scandal. Congress enacted a neutral provision of the tax code, but an executive agency enforced it non-neutrally, discriminating on invidious grounds. It discriminated against the Tea Party,<sup>37</sup> the most potent political force that the President's party faced in the mid-term elections. It dis-

<sup>30</sup> Written Testimony of Carter Hull, Before the House Oversight and Gov't Reform Comm. (July 18, 2013), <http://oversight.house.gov/wp-content/uploads/2013/07/Hull-Testimony-Final.pdf>.

<sup>31</sup> See 26 U.S.C. § 7803(b)(1).

<sup>32</sup> Press Release, The White House: Office of the Press Sec'y, President Obama Announces More Key Treasury Appointments (Apr. 17, 2009), <http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-treasury-appointments>.

<sup>33</sup> Press Release, U.S. Dep't of the Treasury, William J. Wilkins Confirmed as Chief Counsel for the Internal Revenue Service, Assistant General Counsel for Treasury (July 28, 2009), <http://www.treasury.gov/press-center/press-releases/Pages/tg245.aspx>.

<sup>34</sup> See President Barack Obama, Remarks by President Obama and Prime Minister Cameron of the United Kingdom in Joint Press Conference, (May 13, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/13/remarks-president-obama-and-prime-minister-cameron-united-kingdom-joint>. The IRS is part of the Department of Treasury, not an independent agency. See 26 USC § 7803 (placing the IRS Commissioner in the Department of the Treasury, and making him removable at the will of the President).

<sup>35</sup> See *Smith v. Meese*, 821 F.2d 1484, 1492 (11th Cir. 1987).

<sup>36</sup> See John Hart Ely, *Gerryanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 621 (1998).

<sup>37</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5 (May 14, 2013), <https://docs.google.com/viewer?url=http://www.washingtonpost.com/blogs/wonkblog/files/2013/05/201310053fr-revised-redacted-1.pdf&chrome=true>.

criminated against those who “criticize how the country is being run.”<sup>38</sup> For good measure, it reportedly discriminated against those “involved in . . . educating on the Constitution and the Bill of Rights.”<sup>39</sup> And it did all this while an embattled incumbent President was running for re-election.<sup>40</sup>

The President may, alas, urge his supporters to “punish our enemies”<sup>41</sup>; but he cannot stand oblivious while the IRS does just that. He may, alas, berate the Supreme Court for protecting political speech<sup>42</sup>; but he cannot turn a blind eye while the IRS muzzles his critics with red tape. He may, alas, call right-leaning groups a “threat to our democracy”<sup>43</sup>—but the real, cardinal threat is unfaithful execution of the laws.

#### CONCLUSION

The President has a personal obligation to “take Care that the Laws be faithfully executed.”<sup>44</sup> The word “faithfully” is, perhaps, a broad grant of discretion, but it is also a real and important constraint. The President cannot suspend laws altogether. He cannot favor unenacted bills over duly enacted laws. And he cannot discriminate on the basis of politics in his execution of the laws. The President has crossed all three of these lines.

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Mr. GOODLATTE. Thank you.  
Mr. Lazarus, welcome.

#### TESTIMONY OF SIMON LAZARUS, SENIOR COUNSEL, THE CONSTITUTIONAL ACCOUNTABILITY CENTER

Mr. LAZARUS. Thank you very much, Mr. Chairman, and thank you, Mr. Ranking Member Conyers and all of the Members of the Committee who are here.

I am afraid I am going to have to disagree with my colleagues on the panel who have spoken so far. Brandishing the Take Care Clause has become a favorite talking point for opponents of an array of Obama administration policies and actions.

All of these efforts, or at least the ones with which I am familiar, are in reality—all these efforts to import the Constitution into what are in reality political and policy attacks are really rhetorical make-weights. They mock the text and original meaning of the Take Care Clause. They flout long-established Supreme Court precedent, and they contradict the consistent practice of all modern presidencies, Republican and Democratic, to implement complex and consequential regulatory programs as Congressman Conyers pointed out.

These critics fault the Obama administration for many things, but essentially two kinds of things: one, making necessary adjustments in timing of implementation of laws and particularly the Affordable Care Act; and secondly, in matching immigration enforcement priorities with available resources and practical, humanitarian, and other exigencies.

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<sup>38</sup> *Id.* at 6, 35.

<sup>39</sup> *Id.* at 30, 38.

<sup>40</sup> *See id.* at 6–10.

<sup>41</sup> Eddie Sotelo, *Interview with the President of the United States Barack Obama*, UNIVISION RADIO (Oct. 25, 2010), transcript available at <http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html>.

<sup>42</sup> President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

<sup>43</sup> President Barack Obama, Remarks by the President and the Vice President at a DNC ‘Moving America Forward’ Rally in Philadelphia, Pennsylvania (Oct. 10, 2010), <http://www.whitehouse.gov/the-press-office/2010/10/10/remarks-president-and-vice-president-a-dnc-moving-america-forward-rally->.

<sup>44</sup> U.S. CONST. art. II, § 3.

But exercising presidential judgment for such reasons is precisely what the Constitution requires. It is precisely what the Framers expected when they established a separate executive branch under the direction of a nationally elected President and charged him to take care that the laws be faithfully executed.

So let's first take a quick look at one of the targets of these charges and that is the phasing in of the ACA employer mandate, which has been called a blatant illegality and many other things. But in fact it is a routine, temporary course correction.

What exactly did the Administration do? On July 2nd, it announced the decision to postpone for 1 year the January 1, 2014 effective date for the ACA requirement that large employers provide their workers with health insurance or pay a tax. This and other subsequently announced delays related to the ACA do not constitute refusals to enforce the ACA at all. On the contrary, they are merely phasing in adjustments designed to ensure effective implementation of the overall statute in accord with Congress' purposes. The Treasury Department's announcement makes that clear and the proposed regulations that it has followed through on on September 5th make that clearer, as does Treasury's statement that it intends to continue fine tuning those regulations and working with the people affected by them until they become finally effective.

And I should emphasize that just after the Administration took this action, President George W. Bush's HHS Secretary, Michael Leavitt, concurred that "the Obama administration's decision to delay the employer mandate was wise." That was based on his experience in phasing in the Medicare Part D prescription drug benefit.

So I have to say that hyperventilating about how extraordinary and unprecedented and unconstitutional these delays are is just that. It is hyperventilation and it is contrary to obvious historical fact.

Nor is the 1-year delay of the employer mandate an affront to the Constitution. The Framers could have prescribed simply that the President execute the laws. So why did they add "faithfully" and "take care"? I have to disagree respectfully with Professor Rosenkranz and Professor Turley about their explanation of the history and original meaning of the clause. Obviously, they were taking pains to clarify that the President's duty is to implement laws in good faith, hence the word "faithfully," and to exercise reasonable care, hence the words "take care," in doing so. The fact is that scholars on both the left and the right concur that this broadly worded phrasing means that the President is to exercise judgment and to handle his enforcement duties with fidelity to all laws, including indeed the Constitution.

As a legal and practical matter, the President's phase in of the employer mandate and other ACA provisions is well within his job description. So is the DACA program, the Deferred Action on Childhood Arrivals. I am not going to go into that now, but Congressman Conyers explained why that is true, and in my written statement, we do so also.

I have to say one quick word about what I know that my good friend and frequent debating partner, Michael Cannon, is going to

focus on and that is his theory—and he gets a lot of credit for thinking it up and marketing it—his theory that Affordable Care Act premium assistance tax credits and subsidies must be available to all—his theory that they are only available to Americans who happen to live in States that have set up their own exchanges. I cannot go into detail about this unfortunately. Perhaps in the questioning, I will be able to do that.

But his theory is that a few phrases in this enormous statute have to be construed in a way that would stiff millions of people who were the intended beneficiaries of the act.

Am I over? I am over.

The fact is that that is not the correct construction of the act, and perhaps we will be able to talk about that further.

[The prepared statement of Mr. Lazarus follows:]

**Prepared Statement of Simon Lazarus, Senior Counsel,  
The Constitutional Accountability Center**

My thanks to the Chair and members of the House Judiciary Committee for inviting me to testify in this inquiry into the provision of Article II, Section 3 of the Constitution, which provides that the President “take care that the laws be faithfully executed.”

I am Senior Counsel to the Constitutional Accountability Center, a public interest law firm, think tank, and action center dedicated to the progressive promise of the Constitution’s text and history.

Recently, opponents of the Affordable Care Act (ACA), have charged that President Obama broke the law and abused his constitutional authority, when,

on July 2, his administration announced a one-year postponement of the January 1, 2014 effective date for the ACA requirement that large employers provide their workers with health insurance or pay a tax.<sup>1</sup> Specifically, opponents claim that this decision ran afoul of the “Take Care” clause quoted above. Indeed, brandishing the “Take Care” clause appears to have become a favored talking point for opponents of an array of Obama administration policies and actions. I presume that this hearing will address several of these instances.

All of these efforts to import the Constitution into what are in reality political and policy debates are rhetorical make-weights. They mock the text and original meaning of the Take Care clause. They flout long-established Supreme Court precedent applying the relevant constitutional provisions. And they contradict the consistent practice of all modern presidencies, Republican and Democratic, to responsibly implement complex and consequential regulatory programs. These critics fault the Obama Administration for making necessary adjustments in timing and matching enforcement priorities with resources and practical, humanitarian, and other exigencies. But exercising presidential judgment in carrying laws into execution is precisely what the Constitution requires. It is precisely what the framers expected, when they established a separate Executive Branch under the direction of a nationally elected President, and charged him to Take Care that the Laws be Faithfully Executed.<sup>2</sup> Certainly, in the policy areas with which I am familiar, that is precisely what the President Obama and the members of his administration are doing—whatever one may think of their actions from a policy or political perspective.

In this written statement, I will focus on the ACA employer mandate issue, and address three other issues as to which ACA opponents have woven a Take Care clause claim into their policy and political attacks. I will also address one other Obama administration action that has come under similar constitutional challenge, the June 2012 decision of the Department of Homeland Security to defer action for

<sup>1</sup> White House Statement, “We’re Listening to Businesses about the Health Care Law” (July 2, 2013), available at <http://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law>.

<sup>2</sup> Akhil Reed Amar, *America’s Constitution: A Biography* 195 (2006): The sweeping provisions of Article II, including the Take Care clause “envisioned the president as a generalist focused on the big picture. While Congress would enact statutes and courts would decide cases one at a time, the president would oversee the enforcement of *all* the laws at once—a sweeping mandate that invited him to ponder legal patterns in the largest sense and inevitably conferred some discretion on him in defining his enforcement philosophy and priorities.”

certain undocumented young people who came to the U.S. as children and have pursued education or military service here.

An article I wrote on the ACA employer mandate issue appeared in *The Atlantic* on July 17 of this year. Another article, on the availability of ACA premium assistance tax credits and subsidies on federally facilitated as well as state-managed health insurance exchange market-places, appeared in *The New Republic* for May 2, 2013. In addition, I testified on the latter subject before the Subcommittee on Energy Policy, Health Care, & Entitlements of the House Committee on Government Oversight & Reform on July 31, 2013. This statement draws upon these writings. I ask that the Committee include my July 31 written testimony in the record of this hearing.

PHASING IN THE ACA EMPLOYER MANDATE:  
“BLATANT ILLEGALITY” OR ROUTINE TEMPORARY COURSE-CORRECTION?

Critics have labeled the employer mandate postponement a “blatantly illegal move” that “raises grave concerns about [President Obama’s] understanding” that, unlike medieval British monarchs, American presidents have, under Article II, Section 3 of our Constitution, a “duty, not a discretionary power” to “take Care that the Laws be faithfully executed.”<sup>3</sup>

These portentous indictments ignore what the Administration actually decided and how it has delimited the scope and purpose of its decision. The Treasury Department’s announcement provides for one year of “transition relief,” to continue working with “employers, insurers, and other reporting entities” through 2014 to revise and engage in “real-world testing” of the implementation of ACA reporting requirements, simplify forms used for this reporting, coordinate requisite public and private sector information technology arrangements, and engineer a “smoother transition to full implementation in 2015.”<sup>4</sup> The announcement described the postponed requirements as “ACA mandatory”—i.e., not discretionary or subject to indefinite waiver. On July 9, Assistant Treasury Secretary Mark Mazur added, in a letter to House Energy and Commerce Committee Chair Fred Upton, that the Department expects to publish proposed rules implementing the relevant provisions “this summer, after a dialogue with stakeholders.”<sup>5</sup>

A month ago, on September 5, the Treasury Department issued those proposed rules. They detail proposed information reporting requirements for insurers and large employers, reflecting, the Department stated, “an ongoing dialogue with representatives of employers, insurers, and individual taxpayers.” It appears from the Department’s release that it intends, through comments that will be received on the proposed rules, to continue fine-tuning ways “to simplify the new information reporting process and bring about a smooth implementation of those new rules.”<sup>6</sup>

In effect, the Administration explains the delay as a sensible adjustment to phase-in enforcement, not a refusal to enforce. And its actions validate that characterization—as any court that had occasion to consider the matter would surely agree.

Indeed, shortly after the initial July 2 announcement, Michael O. Leavitt, who served as Health and Human Services Secretary under President George W. Bush, concurred that “The [Obama] Administration’s decision to delay the employer mandate was wise.”<sup>7</sup> Secretary Leavitt made this observation based on his own experience with the Bush Administration’s initially bumpy but ultimately successful phase-in of the prescription drug benefit to Medicare, which was passed in 2003 and implemented in 2006.

<sup>3</sup>Michael W. McConnell, “Obama Suspends the Law,” *The Wall Street Journal* (July 8, 2013), available at: <http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html>.

<sup>4</sup>Mark J. Mazur, United States Department of the Treasury, “Continuing to Implement the ACA in a Careful, Thoughtful Manner” (July 2, 2013), available at <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner.aspx>.

<sup>5</sup>Letter from Mark J. Mazur, United States Department of the Treasury to the Honorable Fred Upton, Chairman, Committee on Energy and Commerce, Washington, D.C., 9 July 2013, available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf>.

<sup>6</sup>United States Department of the Treasury Press Release, “Treasury Issues Proposed Rules for Information Reporting by Employers and Insurers Under the Affordable Care Act” (September 5, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2157.aspx>.

<sup>7</sup>Michael O. Leavitt, “To implement Obamacare, look to Bush’s Medicare reform,” *Washington Post* (July 12, 2013), available at [http://www.washingtonpost.com/opinions/to-implement-obamacare-the-right-way-look-to-bushs-medicare-reform/2013/07/12/c2031718-e988-11e2-8f22-de4bd2a2bd39\\_story.html](http://www.washingtonpost.com/opinions/to-implement-obamacare-the-right-way-look-to-bushs-medicare-reform/2013/07/12/c2031718-e988-11e2-8f22-de4bd2a2bd39_story.html).

Experience so far strongly bears out Secretary Leavitt's expectation that delaying the employer mandate reporting requirements to simplify and improve them would facilitate smooth implementation of those provisions, without undermining the rest of the ACA, or Congress' broad goals in enacting it. The vast majority of the nation's six million employers—96%—employ fewer than 50 workers, and are therefore not covered by the employer mandate. Of those 200,000 that are covered, at least 94% already offer health insurance; so, during 2014—the one-year period during which those employers will not be penalized for failing to insure their employees—a relatively small number of workers will remain uninsured because of the delayed implementation of the employer mandate. And even those workers will, during 2014, be eligible for policies marketed on ACA exchanges and also for premium assistance subsidies.<sup>8</sup>

Though “wise,” is the current postponement “illegal?” On the contrary, Treasury's Mazur wrote to Chair Upton, such temporary postponements of tax reporting and payment requirements are routine, citing numerous examples of such postponements by Republican and Democratic administrations when statutory deadlines proved unworkable.

Across federal agencies, failure to meet statutory deadlines for promulgating regulations or taking other regulatory actions is, inevitably, a routine feature of implementing complex regulatory laws like the ACA. To take one particularly well-known example, the Environmental Protection Agency, under Republican and Democratic administrations, has often found it necessary to phase-in implementation of requirements beyond statutory deadlines, to avoid premature actions that were poorly grounded or conflicted with other mandates applicable to EPA or other agencies. These, of course, are precisely the types of practical considerations that the Treasury Department has cited for postponing implementation of the reporting requirements pertinent to the employer mandate, and the mandate itself. Last year, as one of many examples, EPA delayed promulgation of Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Sulfur, over the objection of some environmental groups, on the pragmatic ground that there is too much scientific uncertainty to enable the Agency to promulgate new standards with the requisite scientific basis.<sup>9</sup>

Applicable judicial precedent places such timing adjustments well within the Executive Branch's lawful discretion. To be sure, the federal Administrative Procedure Act authorizes federal courts to compel agencies to initiate statutorily required actions that have been “unreasonably delayed.”<sup>10</sup> But courts have found delays to be unreasonable only in rare cases where, unlike this one, inaction had lasted for several years, and the recalcitrant agency could offer neither a persuasive excuse nor a credible end to its dithering. In deciding whether a given agency delay is reasonable, current law admonishes courts to consider whether expedited action could adversely affect “higher or competing” agency priorities, and whether other interests could be “prejudiced by the delay.”<sup>11</sup> Even in cases where an agency outright refuses to enforce a policy in specified types of cases—not the case here—the Supreme Court has declined to intervene. As former Chief Justice William Rehnquist noted in a leading case,<sup>12</sup> courts must respect an agency's presumptively superior grasp of “the many variables involved in the proper ordering of its priorities.” Chief Justice Rehnquist suggested that courts should defer to Executive Branch judgment unless an “agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>13</sup> The Obama Administration has not and is not about to abdicate its responsibility to implement the statute on whose success his historical legacy will most centrally depend.

Nor is the one-year delay of the employer mandate an affront to the Constitution. In the relevant constitutional text, note the term, “faithfully,” and the even more

<sup>8</sup>Ezekiel J. Emanuel, “Obama's Insurance Delay Won't Affect Many,” *New York Times* (July 3, 2013), available at [http://opinionator.blogs.nytimes.com/2013/07/03/obamas-insurance-delay-wont-affect-many/?\\_r=0](http://opinionator.blogs.nytimes.com/2013/07/03/obamas-insurance-delay-wont-affect-many/?_r=0).

<sup>9</sup>To be sure, some administrative “delays” have in fact constituted *de facto* decisions not to enforce or implement laws, indefinitely and for policy reasons. For example, during the administration of President George W. Bush, EPA was frequently criticized in such terms for shelving a broad spectrum of regulations and other initiatives. In at least one highly visible instance, involving the agency's mandate to determine whether greenhouse gases are pollutants requiring regulation under the Clean Air Act, the Supreme Court ordered EPA to institute formal proceedings to make such a determination. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>10</sup>The Administrative Procedure Act, 5 U.S.C. § 706.

<sup>11</sup>*Telecommunications Research and Action Center, et al. v. FCC*, 750 F.2d 70, 80 (1984).

<sup>12</sup>*Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985).

<sup>13</sup>470 U.S. at 833 n.4.



striking phrase, “take care” (which, by the way, is not included in the title of this hearing). The framers could have prescribed simply that the President “execute the laws.” Why did they add “faithfully” and “take care?”<sup>14</sup> Defining the President’s duty in this fashion necessarily incorporated—or reaffirmed the previously implicit incorporation—of the concept that the President’s duty is to implement laws in good faith, and to exercise reasonable care in doing so. Scholars on both left and right concur that this broadly-worded phrasing indicates that the President is to exercise judgment, and handle his enforcement duties with fidelity to all laws, including, indeed, the Constitution.<sup>15</sup> Both Republican and Democratic Justice Departments have consistently opined that the clause authorizes a president even to decline enforcement of a statute altogether, if in good faith he determines it to be violative of the Constitution. To be sure, as one critic has noted, a president cannot “refuse to enforce a statute he opposes for policy reasons.”<sup>16</sup> But, while surely correct, that contention is beside the point here.

The Administration has not postponed the employer mandate out of policy opposition to the ACA, nor to any specific provision of it. It is ludicrous to suggest otherwise, and at best misleading to characterize the action as a “refusal to enforce” at all. Rather, the President has authorized a minor temporary course correction regarding individual ACA provisions, necessary in his Administration’s judgment to faithfully execute the overall statute, other related laws, and the purposes of the ACA’s framers. As a legal as well as a practical matter, that’s well within his job description.

In effect, ACA opponents’ constitutional argument to the contrary amounts to asserting that the Administrative Procedure Act itself ratifies unconstitutional behavior. As noted above, the APA recognizes that delayed implementation of rules, beyond statutory deadlines, can come within the Executive Branch’s lawful discretion, as long as such delays are “reasonable.” Opponents’ claim is that the “take care” clause must be interpreted to condemn any deviation from a statutory deadline for implementing a regulation, no matter how reasonable. This implausible interpretation flouts, not only Congress’ understanding as expressed through the text of the APA, but administrative and judicial precedent as well.

IS THE ADMINISTRATION’S POSTPONEMENT, IN SPECIFIED INSTANCES, FOR ONE YEAR ENFORCEMENT OF ACA INSURANCE MARKET REFORMS AN “UNREASONABLE DELAY” UNDER THE APA, OR A VIOLATION OF THE CONSTITUTION’S “TAKE CARE” CLAUSE?

On November 14, HHS’ Director of the Center for Consumer Information and Insurance oversight, Gary Cohen, sent a letter to all state insurance commissioners, in which he announced a “transitional policy” of permitting health insurers to “choose to continue coverage” for one additional year, for policies commencing between January 1, 2014, and October 1, 2014, that would otherwise be terminated or cancelled,” because such policies are out of compliance with several of the ACA’s insurance market reform protections.<sup>17</sup> The letter stated that “State agencies responsible for enforcing the specified market reforms are encouraged to adopt the same transitional policy with respect to this coverage.” As this language indicates, the Administration was thereby not changing the law, or giving employers a waiver from a statutory requirement, but instead merely announcing a “transitional” *enforcement* policy for the federal government—one that state regulators are free to emulate or not, as they see fit. As of last week, many state insurance regulatory authorities, in states including Alaska, Arkansas, California, Colorado, Connecticut, Indiana, Maryland, Massachusetts, Minnesota, Nebraska, New York, Oklahoma, Oregon, Rhode Island, Vermont, Virginia, Washington, and West Virginia, as well as

<sup>14</sup> Initial drafts of what became what is now known as the “Take Care” clause provided simply that the President was to “carry into execution the national laws.” In July 1787, in the Committee of Detail, charged with drafting language for the full convention to consider, there was debate over the phrase “the power to carry into execution,” and when the Committee returned, that phrase had been removed, the new “take care language” emerged in place of the former phrase. As Farrand notes, some of the phrases under debate included (Max Farrand, *The Records of the Federal Convention of 1787, Volume II* 171): (He shall take care to the best of his ability that the laws) (It shall be his duty to provide for the due & faithful exec—of the Laws) of the United States (be faithfully executed) (to the best of his ability). Ultimately, the Committee on Style adopted the phrase “take care that the laws be faithfully executed” into constitutional text in September 1787.

<sup>15</sup> See Stephen G. Calabresi & Saikrishna B. Prakash, “The President’s Power to Execute the Laws,” 104 Yale L. J. 541 (1994); see also Lawrence Lessig & Cass R. Sunstein, “The President and the Administration,” 94 Colum. L. Rev. 1 (1994).

<sup>16</sup> McConnell, “Obama Suspends the Law.”

<sup>17</sup> <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF>.

Washington, D.C., have declined to adopt the transitional policy, and, hence, will bar issuance of policies inconsistent with the ACA market reform requirements, as of January 1, 2014, as prescribed in the statute.<sup>18</sup> As with the one-year delay of finalization of the employer mandate reporting requirements and enforcement of the mandate, this “encouragement” of state regulators to permit a one-year transitional renewal of non-compliant individual insurance policies would clearly not be an unreasonable delay under the Administrative Procedure Act, and would not violate the constitutional Take Care clause.

DOES THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) PROGRAM “BREACH” THE PRESIDENT’S DUTY UNDER THE “TAKE CARE” CLAUSE—OR APPROPRIATELY PRIORITIZE ENFORCEMENT PRIORITIES, WHILE FAITHFULLY IMPLEMENTING THE IMMIGRATION LAWS?

Critics have also alleged that the Administration’s “Deferred Action for Childhood Arrivals (DACA) program constitutes a “breach” of the President’s duty to take care that the laws be faithfully executed. On June 15, 2012, President Obama signed a memorandum calling on the Department of Homeland Security to defer action for certain undocumented young people who came to the U.S. as children and have pursued education or military service here.<sup>19</sup> On August 15, 2012, the Department began accepting applications for deferred action status under the program. Contrary to the critics, this action violates neither the Constitution nor the immigration laws, and is, indeed similar to the prosecutorial discretion actions taken by other presidents, of both parties, that have been part and parcel of immigration enforcement policy for decades.

To begin with, it is specious to suggest that the Obama administration is systematically failing in its obligation to enforce the immigration laws. On the contrary, the administration has detained and deported noncitizens at record levels—approximately 400,000 annually, compared to 150,542 in 2002. The 400,000 figure is not an accident. Congress has provided funding to cover 400,000 removals per year. This is less than 4% of the total estimated population of unauthorized residents of the country—11.5 million. Setting enforcement priorities is, obviously, essential, given this huge shortfall of available resources.<sup>20</sup> The criteria prescribed in the DACA program are entirely sensible, and in keeping with prioritization criteria long characteristic of immigration enforcement.

As 128 academic immigration law experts explained in a letter to the President outlining his authority to institute a program like DACA:

*Deferred action* is a long-standing form of administrative relief. . . . It is one of many forms of prosecutorial discretion available to the Executive Branch. A grant of deferred action can have any of several effects. . . . it can prevent an individual from being placed in removal proceedings, suspend any proceedings that have commenced, or stay the enforcement of any existing removal order. It also makes the recipient eligible to apply for employment authorization. . . . [T]he U.S. Supreme Court has made clear that decisions to initiate or terminate enforcement proceedings fall squarely within the authority of the Executive [citing *Heckler v. Chaney*, 460 U.S. 821, 831 (1985)]. In the immigration context, the Executive Branch has exercised its general enforcement authority to grant deferred action since at least 1971. Federal courts have acknowledged the existence of this executive power at least as far as back as the mid-1970s.<sup>21</sup>

Moreover, the Obama administration’s decision to use deferred action in the systematic manner it has with DACA is not at all exceptional. In 2005, for example, the George W. Bush administration announced deferred action for the approximately 5,500 foreign academic students caught in the aftermath of Hurricane Katrina—quite appropriately. In 2009, then-DHS Secretary Napolitano announced deferred

<sup>18</sup> *The Commonwealth Fund Blog* posted on November 27 a review of states which have, have not, and are still deciding how they wish to respond to the Administration’s “encouragement,” together with explanations of the consequences of alternative state resolutions. <http://www.commonwealthfund.org/Blog/2013/Nov/State-Decisions-on-Policy-Cancellations-Fix.aspx?omnicid=20>.

<sup>19</sup> Department of Homeland Security Press Release, “Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities” (June 15, 2012).

<sup>20</sup> See Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 Tex. L. Rev. 59 (2013).

<sup>21</sup> Letter from 128 academic immigration law experts to President Obama, Washington, D.C., 28 May 2012, available at <http://www.law.uh.edu/ihehg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf>.

action for the widows of U.S. citizens for two years, to “allow these individuals and their children an opportunity to stay in the country that has become their home while their legal status is resolved.” Secretary Napolitano also used defer action to keep immigrants who are the spouses, parents, and children of military personnel together with their families. Agency memoranda providing guidance for deferred action programs frequently stated that such exercises of “prosecutorial discretion . . . are designed to ensure that agency resources are focused on our enforcement priorities, including individuals who pose a threat to public safety, are recent border crossers, or repeatedly violate our immigration laws.”<sup>22</sup> The DACA program implements similar criteria and is well within the immigration enforcement approaches of this and past administrations.

Just a year and a half ago, a 5–3 majority of the Supreme Court opined that “A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. . . .” The Court—in an opinion by Justice Anthony Kennedy, joined by Chief Justice Roberts, and Associate Justices Ginsburg, Breyer, and Sotomayor—went on to specify that “Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime.”<sup>23</sup> That very recent analysis by a broad-based Supreme Court majority is completely at odds with the critics’ cramped interpretation of the President’s immigration enforcement discretionary authority, let alone their equally cramped interpretation of the Constitution’s Take Care clause.

Indeed, these critics’ reliance upon the Take Care clause seems particularly out of place, for it is precisely that provision which, construed as it has always been by the courts, is the source of the President’s broad authority to exercise prosecutorial discretion. As the Supreme Court held in the leading case, *Heckler v. Chaney*, cited above, decisions not to indict or to institute civil proceedings have “long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” Obviously, faithful execution does not empower the President to disregard statutory requirements, but it requires applying specific requirements in a manner that is faithful to effective implementation of the overall statutory scheme, to the other affected laws, and to the Constitution. That is precisely what the Obama Administration is attempting to do as it phases in an exceptionally complex and consequential new law.

THE OBAMA ADMINISTRATION HAS CORRECTLY DETERMINED THAT ACA PREMIUM ASSISTANCE TAX CREDITS AND SUBSIDIES MUST BE AVAILABLE TO ALL ELIGIBLE AMERICANS, WHETHER THEY RESIDE IN STATES THAT OPERATE THEIR OWN EXCHANGES OR IN STATES WITH FEDERALLY FACILITATED EXCHANGES

Affordable Care Act opponents have taken the Treasury Department to task—and to court—for adopting a regulation in May 2012<sup>24</sup> that affirms that ACA premium assistance tax credits and subsidies are available to all eligible Americans nationwide, whether they reside in states that have elected to operate their own insurance exchange market-places or in states that have elected to have the Federal government operate the exchange covering their residents. These critics, of whom my copanelist Michael Cannon was among the first and most energetic, assert that Treasury’s interpretive regulation “rewrites the law.” In fact, however, it is Mr. Cannon and his allies who would rewrite the ACA. And from their standpoint as die-hard ACA opponents, for a good reason. Their invitation to the courts to impose their interpretation is, in their own terms, a play “for all the marbles.” In the 33 or so states now utilizing federally facilitated exchanges, their proposed reinterpretation would, they gloat, “sink” the ACA “drive a stake through the heart of Obamacare,” and “threat[en]” its “survival.”<sup>25</sup>

When the law was enacted in March 2010, no one, on either side of the aisle, had ever heard of, let alone embraced, the Cannon interpretation. The ACA’s fiercest critics agreed with its most fervent supporters about one thing; that it had, and has, a clear and simply stated goal—“to achieve near-universal health insurance cov-

<sup>22</sup> Wadhia at 68.

<sup>23</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

<sup>24</sup> 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012).

<sup>25</sup> See, e.g., Michael Cannon, “No Obamacare Exchanges,” *National Review Online* (April 12, 2012), <http://www.nationalreview.com/articles/295773/no-obamacare-exchanges-michael-f-cannon>; Dan Diamond, “Could Halbig et al. v. Sebelius Sink Obamacare,” *The Health Care Blog*, (June 11, 2013) (quoting Michael Greve: “This is for all the marbles.”), <http://thehealthcareblog.com/blog/2013/06/11/could-halbig-et-al-v-sebelius-sink-obamacare/>.

erage,” and they understood that the premium assistance necessary to achieve that goal would be available in all states. To my knowledge, not until late in 2011 did Mr. Cannon surface his claim to the contrary. He said at the time that he “was first made aware of this aspect of the ACA” in December 2010, nine months after enactment. To ACA opponents probing for any opportunity, no matter how far-fetched, to impede the law’s implementation, the discovery of this apparent “glitch” must have been invigorating.

But In fact, everyone was right at the beginning. The ACA’s text does *not* sabotage its universally acknowledged purpose of ensuring access to health insurance for millions of Americans who cannot now afford it. To make their implausible case to the contrary, the opponents snatch a few isolated phrases out of context, and ignore the rest of the 2700 page statute. Numerous provisions of the law confirm that eligible residents of all states shall receive the premium assistance they need.

In a nutshell, the text of the ACA provides that if state decides not to set up an Exchange, the federal government is to step in and set one up in its place. The same rules apply to all Exchanges, whether it’s the states or the federal government that operates them. Under the opponents’ tortured reading, all sorts of individual provisions in the statute do not work, and, indeed, the exchange marketplaces themselves will not work. That result, of course, is precisely what these die-hard opponents intend. But it’s the opposite of what the Congress that enacted the ACA intended.

In order to justify their implausible reading of the ACA’s text, opponents have concocted an even more head-scratching claim—that the sponsors of the law “purposefully” designed it to achieve this self-immolation. Their theory is that, by threatening to deprive residents of states of premium tax credits, Congress sought to “coerce” states to set up Exchanges. If true, what the Act really means, and what its sponsors really intended, is a result that would not only cancel the core benefit the law sought to confer, for the core constituency it aimed to benefit. More remarkably, under the opponents’ misread, the ACA’s sponsors would have intentionally handed over to ACA opponents in state capitols the power to subvert the law in their states. In effect, they would have given Mr. Cannon’s political allies that “stake” and invited them to drive it through the heart of the ACA. Is that plausible?

Unsurprisingly, there is not a single piece of evidence in the legislative record to support the notion that Congress was threatening states into setting up Exchanges. There is no mention of this idea anywhere in the voluminous pages of the debate over the Affordable Care Act. No one, supporter or opponent of the law, brought it up.

And certainly no one ever communicated to any state official that they risked depriving their residents of affordable health care if they refused to set up their own Exchanges. *There is no such thing as a stealth threat.* A threat must be communicated. Here, none ever was. In and of itself, this is fatal to the upside-down interpretation opponents are asking the courts to embrace.

How likely is it that a majority of the Supreme Court, or any court, will endorse the perverse premise of these ACA opponents, and bar access to affordable quality health care for millions of people whom Congress specifically intended to benefit? Such a decision, especially if rendered by an ideologically divided court, will likely appear to the public as a radical ratcheting up of the regrettable tradition of *Bush v. Gore*—though less principled and more transparently political. I doubt that the judiciary will take the bait these lawsuits tender, and venture out on that limb.

And, self-evidently, it is frivolous to suggest that the Obama Administration is violating the Constitution’s mandate to take care that the laws be faithfully executed by implementing the ACA’s exchange provisions in a manner that is faithful to the ACA’s text, to the purpose of the Congress that enacted it, and to the needs of millions of hard-working Americans for access to affordable health insurance.

#### CONCLUSION

In sum, the various critiques being vetted here, of the Affordable Care Act and other Obama Administrative initiatives, reflect political and policy-driven criticisms routine in a democratic polity, especially one as polarized as we are today. But attempts to wrap those arguments in the Constitution just thicken the political fog. They deserve no attention from people who are seriously interested in evaluating competing policy and political claims, or in facilitating, rather than obstructing, resolution of those differences.

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Mr. GOODLATTE. Thank you, Mr. Lazarus.  
Mr. Cannon, welcome.

**TESTIMONY OF MICHAEL CANNON, DIRECTOR OF  
HEALTH POLICY STUDIES, CATO INSTITUTE**

Mr. CANNON. Thank you, Mr. Goodlatte and Mr. Conyers and Members of the Committee.

I want to start off by saying that the concerns that I am going to be sharing with you today are not born of partisanship. It is no secret that I have worked for Republicans. I myself am not a Republican. I am acutely aware of the last Republican President's failure to execute the laws faithfully. In 2008, though I supported neither major party presidential candidate, I actually preferred Barack Obama to his opponent in part because he promised to curb such abuses by the executive, and I praise President Obama for doing more than even many Libertarians to celebrate the gains in equality and freedom our Nation has secured for women, for African Americans, for gays, and for lesbians.

Article II, section 3 of the Constitution, to which every President swears an oath, commands that the President shall take care that the laws be faithfully executed. Fealty to this duty is essential for maintaining our system of Government and public order.

The law is a reciprocal pact between the Government and the governed. Public order requires Government to remain faithful to the laws as much as it requires the citizenry to do so because if the actions of Government officials lead citizens to conclude that those officials are no longer meaningfully bound by the law, then citizens will rightly conclude that neither are they.

Since he signed the Patient Protection and Affordable Care Act into law, President Obama has failed to execute that law faithfully.

The President has unilaterally taken taxpayer dollars made available by the PPACA and diverted them from their congressionally authorized purposes toward purposes for which no Congress has ever appropriated funds.

He has unilaterally and repeatedly rewritten the statute to disperse taxpayer dollars that no Federal law authorizes him to spend and that the PPACA expressly forbids him to spend.

He has unilaterally issued blanket waivers to requirements that the PPACA does not authorize him to waive.

At the same time, he has declined to collect taxes that the PPACA orders him to collect, he has unilaterally rewritten the statute to impose billions of dollars in taxes that the PPACA expressly forbids him to impose and to incur billions of dollars in debt that the statute expressly forbids him to incur.

He has unilaterally rewritten the PPACA to allow health insurance products that the statute expressly forbids, and he has encouraged consumers, insurers, and State officials to violate a law that he himself enacted.

And he has taken these steps for the purpose of forestalling democratic action by the people's elected representatives in Congress.

President Obama's unfaithfulness to the PPACA is so wanton that it is no longer accurate to say that that statute is the law of the land. Today, with respect to health care at least, the law of the land is whatever one man says it is or whatever this divided Congress will let him get away with saying. What this one man says may flatly contradict Federal statute. It may suddenly confer bene-

fits on favored groups or tax disfavored groups without representation. It may undermine the careful and costly planning done by millions of individuals and businesses. It may change from day to day. This method of lawmaking has more in common with monarchy than with democracy or a constitutional republic.

This President's failure or any President's failure to honor his constitutional duty to execute the laws faithfully is not a partisan issue. The fact that Presidents from both parties violate this duty is cause not for solace. It is cause for even greater alarm because it guarantees that Presidents from both parties will replicate and even surpass the abuses of their predecessors as payback for past injustices. The result is that democracy and freedom will suffer no matter who occupies the Oval Office.

I thank you and I look forward to your questions.

[The prepared statement of Mr. Cannon follows:]

**The President's Duty to Execute Faithfully  
the Patient Protection and Affordable Care Act**

**Testimony of**

**Michael F. Cannon  
Director of Health Policy Studies  
Cato Institute**

**Before the**

**Committee on the Judiciary  
United States House of Representatives**

**December 3, 2013**

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Michael F. Cannon. I am the director of health policy studies at the Cato Institute. Founded in 1977, the Cato Institute is a non-partisan, non-profit, 501(c)(3) educational foundation located in Washington, D.C., whose mission is to promote the principles of individual liberty, limited government, free markets, and peace. To maintain its independence, the Cato Institute accepts no government funding.

Thank you for the opportunity to offer my perspective on the president's constitutional duty to "take Care that the Laws be faithfully executed"<sup>1</sup> as it relates to the Patient Protection and Affordable Care Act of 2010.<sup>2</sup>

**Introduction**

Article II, Section 3 of the U.S. Constitution, to which every president swears an oath, commands that the president "shall take Care that the Laws be faithfully executed."<sup>3</sup> Fealty to this duty is essential for maintaining our system of government and public order.

The law is a reciprocal pact between the government and the governed. Public order requires government to remain faithful to the law as much as it requires the citizenry to do so. If the actions of government officials lead citizens to conclude that those officials are no longer meaningfully bound by the law, then citizens will rightly conclude that neither are they.

Since he signed the Patient Protection and Affordable Care Act (PPACA) into law on March 23, 2010, President Barack Obama has failed to execute that law faithfully.

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<sup>1</sup> U.S. Const. art. II, § 3.

<sup>2</sup> I also wish to thank Jonathan H. Adler, the Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, for his assistance with this testimony.

<sup>3</sup> U.S. Const. art. II, § 3.

The president has unilaterally taken taxpayer dollars made available by the PPACA and diverted them from their congressionally authorized purposes toward purposes for which no Congress has ever appropriated funds.

He has unilaterally and repeatedly rewritten the statute to dispense taxpayer dollars that no federal law authorizes him to spend and that the PPACA expressly forbids him to spend.

He has unilaterally issued blanket waivers to requirements that the PPACA does not authorize him to waive.

At the same time he has declined to collect taxes the PPACA orders him to collect, he has unilaterally rewritten the statute to impose billions of dollars in taxes that the PPACA expressly forbids him to impose, and to incur billions of dollars in debt that the statute expressly forbids him to incur.

He has unilaterally rewritten the PPACA to allow health insurance products that the statute expressly forbids. He has *encouraged* consumers, insurers, and state officials to violate a federal law he enacted.

And he has taken these steps *for the purpose* of forestalling democratic action by the people's elected representatives in Congress.

President Obama's unfaithfulness to the PPACA is so wanton, it is no longer accurate to say the Patient Protection and Affordable Care Act is "the law of the land." Today, with respect to health care, the law of the land is whatever one man says it is – or whatever this divided Congress will let that one man get away with saying. What this one man says may flatly contradict federal statute. It may suddenly confer benefits on favored groups, or tax disfavored groups without representation. It may undermine the careful and costly planning done by millions of individuals and businesses. It may change from day to day. This method of lawmaking has more in common with monarchy than democracy or a constitutional republic.

#### **Diverting Prevention Funds to Federal Exchanges**

A simple example of the president rewriting the PPACA is his redirection of nearly half a billion dollars that Congress appropriated for the law's Prevention and Public Health Fund toward the creation of federal health insurance "exchanges," for which Congress appropriated no funds.

Earlier this year, the *Washington Post* reported, "The Obama administration plans to use \$454 million in Prevention Fund dollars to help pay for the federal health insurance exchange. That's 45 percent of the \$1 billion in Prevention Fund spending available [in 2013]."<sup>4</sup> Senator Tom Harkin (D-IA) attacked the administration's attempt "to redirect that money to educating the

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<sup>4</sup> Sarah Kliff, *The Incredible Shrinking Prevention Fund*, *Washington Post*, Apr. 19, 2013, at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/19/the-incredible-shrinking-prevention-fund/>.



public about the new health insurance marketplaces” as “a violation of both the letter and spirit of this landmark law.”<sup>5</sup>

### **Illegal Subsidies to Members of Congress**

The president has issued illegal subsidies to members of Congress for three years, and overruled career federal officials at the Office of Personnel Management by dictating that that agency would provide further illegal subsidies to members of Congress and their staffs for the purchase of health insurance through the PPACA’s Small Business Health Options Program (SHOP) Exchanges.

To ensure that members of Congress and their staffs would experience the PPACA in the same manner as the citizenry, the statute bars them from the Federal Employees Health Benefits Program (FEHBP), and effectively offers them only Exchange coverage as a substitute. The statute provides:

Notwithstanding any other provision of law, after the effective date of this subtitle, the only health plans that the Federal Government may make available to members of Congress and congressional staff with respect to their service as a member of Congress or congressional staff shall be health plans that are created under this act...or offered through an exchange established under this act...<sup>6</sup>

Even though the Exchanges were not to become operative until 2014, this provision as written took effect immediately upon enactment.<sup>7</sup> And because it immediately barred members and staff from the FEHBP, it also stripped them of the roughly \$5,000 the federal Treasury pays toward the premiums of FEHBP participants who select self-only coverage, or the roughly \$11,000 it pays on behalf of those who choose family coverage. President Obama quite literally and perhaps unjustly signed a law throwing nearly all members of Congress and congressional staff out of their health plans, and cutting their pay by thousands of dollars per year.

Rather than faithfully execute that law, however, the president chose to keep providing that coverage to members and staff and to keep making those payments, as if nothing had happened. The president has been providing illegal coverage and illegal subsidies to members of Congress and congressional staff for more than three years.<sup>8</sup>

Even after the Exchanges take full effect, this provision as written continues to strip members and staff of the “contribution” the federal government makes toward the premiums of those who participate in the FEHBP. Under federal law, those payments are available only for the purchase

<sup>5</sup> The Importance of the Prevention Fund to Save Lives and Money, Sen., 113th Cong. (2013), (statement of Sen. Tom Harkin, Chairman of the Senate Health Education, Labor, and Pensions Committee).

<sup>6</sup> Patient Protection and Affordable Care Act, 42 U.S.C. § 18032 (2010).

<sup>7</sup> Robert Pear, *Baffled by Health Plan? So Are Some Lawmakers*, N.Y. Times, Apr. 12, 2010, at <http://www.nytimes.com/2010/04/13/us/politics/13health.html>.

<sup>8</sup> Jerry Markon, *Problem Over Health Coverage for Capitol Hill is Resolved*, Washington Post, Apr. 21, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042005163.html>.

of plans within the FEHBP, not through the PPACA's Exchanges. Neither the PPACA nor any other federal statute authorizes the administration to continue making those payments on behalf of members and staff. Nor does the PPACA allow employers to pay their employees' premiums through the law's (individual-market) American Health Benefits Exchanges. Nor does it permit large employers – much less the nation's largest employer – to purchase coverage for their employees through its Small Business Health Options Program (SHOP) Exchanges. As a result, *Politico* reports, "OPM initially ruled that lawmakers and staffers couldn't receive the subsidies once they went into the exchanges."<sup>9</sup>

After President Obama personally intervened,<sup>10</sup> OPM reversed its ruling. The agency announced it would make those \$5,000 or \$11,000 payments on behalf of members and staff who obtained coverage through SHOP Exchanges. OPM's purported justification for this newfound authority does not withstand scrutiny.<sup>11</sup>

Instead, President Obama once again unilaterally rewrote federal law to give nearly every member of Congress and congressional staffer an illegal subsidy of \$5,000 to \$11,000 per year.<sup>12</sup> Faithfully executing the law would have required the president to let the OPM's ruling stand, and let Congress address the matter through legislation.

#### **Spending Billions That the PPACA Expressly Forbids the President to Spend**

The president's most egregious violation of his duty to execute faithfully the PPACA is his attempt – under the rubric of that law – to tax, borrow, and spend billions of dollars that statute expressly prohibits him to spend.<sup>13</sup>

The relevant provisions of the Act are complex, but the law is abundantly clear. The PPACA authorizes the creation of state-specific health insurance "exchanges" that regulate health insurance within each state. It asserts that "Each State shall . . . establish" an Exchange. It directs the Secretary of Health and Human Services to establish an Exchange in states that do not. It

<sup>9</sup> John Bresnahan, *Government Shutdown: John Boehner's private fight for Hill health subsidies*, *Politico*, Oct. 1, 2013, at <http://www.politico.com/story/2013/10/john-boehner-hill-obamacare-subsidies-97634.html>.

<sup>10</sup> John Bresnahan & Jake Sherman, *President Obama on Hill's Obamacare Mess: I'm On It*, *Politico*, Jul. 31, 2013, at <http://www.politico.com/story/2013/07/obama-hill-health-care-dispute-95017.html>. ("President Barack Obama privately told Democratic senators Wednesday he is now personally involved in resolving a heated dispute over how Obamacare treats Capitol Hill aides and lawmakers, according to senators in the meeting.")

<sup>11</sup> Doug Badger, *Congress IS Getting a Special Deal Under Obamacare*, *dougsbriefcase.com* (Oct. 1, 2013), <http://www.dougsbriefcase.com/blog/congress-getting-special-deal-obamacare/>.

<sup>12</sup> Ordinary Americans who are suffering similar pay cuts as a result of the PPACA will receive no such relief. Michael F. Cannon, *Congress's Obamacare Waiver*, *National Review*, Aug. 6, 2013, at <http://www.nationalreview.com/article/355176/congress-obamacare-waiver-michael-f-cannon>.

<sup>13</sup> See Jonathan Adler & Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 *Health Matrix* 1, 119 (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2106789](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106789); see also Brief of Amicus Curiae Jonathan Adler & Michael Cannon, *King v. Sebelius*, No. 13-cv-630 (E.D.Va. Nov. 27, 2013), [http://object.cato.org/sites/cato.org/files/pubs/pdf/king\\_adler\\_cannon\\_amicus\\_brief.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/king_adler_cannon_amicus_brief.pdf), and attached.

offers health insurance subsidies<sup>14</sup> to certain taxpayers who enroll in a qualified health plan “through an Exchange established by the State under Section 1311.”<sup>15</sup> Finally, the PPACA exempts employers from its “free-rider penalty,” and exempts millions of individual taxpayers from its individual-mandate penalties, if their states opt not to establish an Exchange. The language of the statute is clear, consistent, and unambiguous.<sup>16</sup>

Nevertheless, shortly after legal scholars brought this feature of the law to the public’s attention in 2011,<sup>17</sup> the Internal Revenue Service proposed a rule that would issue those subsidies – and impose the resulting taxes – through *federal* Exchanges as well as state-established Exchanges.<sup>18</sup> Congressional Budget Office estimates indicate that issuing subsidies in the 34 states that have refused to establish Exchanges would cost taxpayers roughly \$700 billion in the first 10 years.<sup>19</sup> The president is literally threatening to tax, borrow, and spend hundreds of *billions* of dollars, without congressional authorization, and indeed in violation of the express language of his own health care law.

The IRS proposed this rule with no apparent regard for the clear language of the statute. Despite public criticism and objections during the notice-and-comment period, the agency finalized its proposed rule in May 2012<sup>20</sup> yet cited neither any provision of the PPACA nor any element of the legislative history in support of its “interpretation” of the law.

My friend, Mr. Simon Lazarus, who is also on this panel, has defended the president’s actions. Yet despite *two years* of searching for some provision of the statute, or some element of the legislative history, that would create ambiguity about the law’s clear meaning or about Congress’ intent, the president and his supporters have offered neither. Mr. Lazarus could make news today by unveiling such a discovery, but one suspects that if any such support for the president’s actions existed, they would have discovered and offered it by now. In fact, the legislative history of the PPACA is fully consistent with the express language of the statute.<sup>21</sup>

#### **Unilateral, Blanket Waivers of the PPACA’s Requirements**

The president has unilaterally and without authority altered the PPACA’s effective dates by issuing blanket exemptions from both the PPACA’s employer mandate and many of its health insurance regulations.

<sup>14</sup> The PPACA describes some of these subsidies as “premium-assistance tax credits,” but they are tax reduction in name only. Functionally, they are government outlays.

<sup>15</sup> I.R.C. § 36B(b)(2)(A), (b)(3)(B)(i), (b)(3)(C), & (c)(2).

<sup>16</sup> See Adler & Cannon, Health Matrix, *supra*; see also Adler & Cannon, Amicus Brief, *supra*.

<sup>17</sup> See, e.g., Jonathan H. Adler, Cooperation, Commandeering or Crowding Out? Federal Intervention and State Choices in Health Care Policy, 20 Kan. J. L. & Pub. Pol’y 199 (2011).

<sup>18</sup> Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011).

<sup>19</sup> See Adler & Cannon, Health Matrix, *supra*, at 138.

<sup>20</sup> Health Insurance Premium Tax Credit, 77 Fed. Reg. 30, 377, 30, 377 (May 23, 2012) (to be codified at 26 C.F.R. pt. 1).

<sup>21</sup> See Adler & Cannon, Health Matrix, *supra*; see also Adler & Cannon, Amicus Brief, *supra*.

After announcing in May 2012 that he would unilaterally impose the PPACA's employer mandate in 34 states where he has no authority to do so, in July 2013, President Obama unilaterally granted a one-year plenary reprieve from that mandate.<sup>22</sup> Again, Sen. Tom Harkin, an author and supporter of the PPACA, asked, "This was the law. How can they change the law?"<sup>23</sup>

The Treasury Department claims its delay of the employer mandate's requirements is an example of the sort of "transition relief" it has provided when implementing past tax legislation.<sup>24</sup> There are a number of difficulties with this rationale. Congress never granted Treasury the power to delay such regulatory requirements for an entire year. This is a more sweeping use of that power than previous uses. The employer mandate is an essential component of a broader regulatory scheme.<sup>25</sup> Finally, there is no limiting principle to the Treasury's claim to power. If the president can delay the employer mandate for one year, can he delay it for 10 years?

The president has also unilaterally rewritten the PPACA's health insurance regulations and in the process failed to execute faithfully the Administrative Procedures Act.

In recent months, millions of Americans have received letters from their health-insurance carriers informing them that their health plans were being cancelled because they did not satisfy the requirements of the PPACA. Amid heavy criticism that he had violated his oft-repeated pledge that "if you like your health plan, you can keep it," President Obama offered to suspend enforcement of numerous PPACA requirements in a manner that would allow some Americans to re-enroll in health plans that remain illegal under federal law, and in some cases under state law.<sup>26</sup>

The president laid out a procedure through which consumers and insurers could engage in illegal activity, and encouraged state officials to facilitate those illegal activities. That procedure conflicts not only with the statute but also with the president's own regulations implementing the statute. With this new procedure, the president imposed obligations on insurers who want to take advantage of this option, yet neither those conditions nor the authority to impose them are found anywhere in the statute or the president's regulations. In effect, the president sought to reinterpret

<sup>22</sup> Mark Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, Treasury Notes (Jul. 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>.

<sup>23</sup> Jonathan Weisman & Robert Pear, *Seeing Opening, House G.O.P. Pushes Delay on Individual Mandate in Health Law*, N.Y. Times, Jul. 9, 2013, at <http://www.nytimes.com/2013/07/10/us/politics/house-gop-pushes-delay-on-individual-mandate-in-health-law.html>.

<sup>24</sup> Mark Mazur, "Letter to Rep. Fred Upton, Chairman of U.S. House Committee on Energy and Commerce", Jul. 9, 2013, at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf>.

<sup>25</sup> Michael F. Cannon, *Delaying the Employer Mandate Requires Delaying All of ObamaCare*, Cato at Liberty (Jul. 3, 2013, 8:50AM), <http://www.cato.org/blog/delaying-employer-mandate-requires-delaying-all-obamacare>.

<sup>26</sup> Gary Cohen, "Letter to State Insurance Commissioners", Nov. 14, 2013, at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF>.

the PPACA's provisions regarding "grandfathered" plans without going through the rulemaking process required by the Administrative Procedures Act.

#### **Declining to Collect Taxes the PPACA Imposes**

By unilaterally suspending the PPACA's employer mandate and minimum-coverage requirements, the president has effectively declined to collect the penalties the statute imposes on those who fail to comply with these provisions.

The Obama administration explained that consumers who retain their (still-illegal) health plans under the specified procedures "will not be considered to be out of compliance with the market reforms," including the minimum-coverage requirements. Importantly, the administration clarified that the Treasury Department, which enforces the individual mandate, "concur[s] with the transitional relief afforded in this document."<sup>27</sup>

In other words, the president announced he will not enforce the individual mandate against those who purchase these still-illegal health plans, even though the PPACA clearly requires him to do so.

#### **Imposing Taxes the PPACA Does Not Authorize**

Even more troubling, President Obama is threatening to impose hundreds of billions of dollars in taxes Congress never authorized on millions of employers and individual taxpayers.

If and when the president begins issuing Exchange subsidies in the 34 states with federally established Exchanges, those subsidies will immediately trigger taxes against employers and individuals in those states. A back-of-the-envelope estimate is that those illegal subsidies will trigger illegal taxes against 8 million individual taxpayers and millions of employers in those 34 states.<sup>28</sup> Since those levies will only cover a fraction of the cost of the subsidies, however, the lion's share of the tax burden the president is unilaterally creating will be imposed on future generations in the form of hundreds of billions of dollars of additional federal debt.

As noted above, the total cost of these illegal taxes will reach \$700 billion over the first 10 years. But since the president claims he can issue these subsidies in *any* state that does not establish the Exchange, he is actually claiming the authority to tax, borrow, and spend more than \$1 trillion (in the event that all states refused to establish Exchanges) that the PPACA expressly says he cannot.

#### **Forestalling Democratic Action**

Underlying each of these instances in which President Obama has unilaterally rewritten federal law is an unmistakable desire to forestall democratic action by the people's elected representatives in Congress.

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<sup>27</sup> *Id.*

<sup>28</sup> See Adler & Cannon, Health Matrix, *supra* at 192-193.

If the president had not raided the Prevention and Public Health Fund, then federal Exchanges might be even less prepared to offer coverage in 2014 than they are now, which almost certainly would have prompted Congress to reopen the PPACA.

If the president had not allowed members of Congress to remain in their health plans through 2014, or had not offered to provide them illegal subsidies thereafter, all observers agree Congress would have reopened the PPACA to maintain its members' compensation packages, and perhaps would have made other changes to the law.

If the president had not unilaterally waived the PPACA's unworkable employer mandate or various health insurance regulations, a revolt by employers and consumers likely would have spurred Congress to do so. Ezra Klein, another supporter of the PPACA, wrote, "This is a regulatory end-run of the legislative process. The law says the mandate goes into effect in 2014, but the administration has decided to give it until 2015 by simply refusing to enforce the penalties."<sup>29</sup> In each case, Congress stood poised to enact into law the very changes that the president announced. Yet the president threatened to *veto* the codification of his own policies. A reasonable supposition is that he would not want the codification of his policies to complicate his ability to rescind them unilaterally at a later date.

If the president were to enforce the PPACA faithfully, by admitting he has no authority to issue Exchange subsidies or to impose the related taxes in states that refuse to establish Exchanges themselves, all observers again agree that Congress would have to reopen the statute for major revisions and possibly repeal.

At this point, it manifestly clear that President Obama is exercising legislative powers he does not possess in order to prevent Congress from exercising the legislative powers that only Congress possesses.

### Conclusion

The concerns I share with you today are not borne of partisanship. Though I have worked for Republicans, I am not a Republican, for reasons that Democrats on this committee can readily appreciate. I am acutely aware of the last Republican president's failures to execute the laws faithfully. In 2008, though I did not support him, I preferred the Democratic presidential candidate to the Republican candidate in part because he promised to curb such abuses by the executive. I have praised President Obama for doing more than even many libertarians to celebrate the gains in equality and freedom our nation has secured for women, for African-Americans, for gays, and for lesbians.<sup>30</sup>

<sup>29</sup> Ezra Klein, *Obamacare's Employer Mandate Shouldn't be Delayed, IT should be Repealed*, Washington Post, Jul. 2, 2013, at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/obamacares-employer-mandate-shouldnt-be-delayed-it-should-be-repealed/>.

<sup>30</sup> Michael F. Cannon, *Seneca Falls, and Selma, and Stonewall*, Cato at Liberty (Jan. 24, 2013, 2:29PM), <http://www.cato.org/blog/seneca-falls-selma-stonewall>.

This president's failure – or *any* president's failure – to honor his constitutional duty to execute the laws faithfully is not a partisan issue. The fact that presidents from both parties violate this duty is cause not for solace. It is cause for even greater alarm, because it guarantees that presidents from both parties will replicate and even surpass the abuses of their predecessors as payback for past injustices. The result is that democracy and freedom will suffer no matter who occupies the Oval Office.

Thank you.

Attachment: Brief of Amicus Curiae Jonathan Adler & Michael Cannon, *King v. Sebelius*, No. 13-cv-630 (E.D. Va. Nov. 27, 2013).

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\*See Appendix for supplemental material submitted by this witness.

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Mr. GOODLATTE. Thank you, Mr. Cannon.

I will begin the questioning under the 5-minute rule.

Professor Rosenkranz, oftentimes the legislative process is about negotiation, about give and take between competing interests and compromise. How does the President's creating, amending, suspending, and ignoring acts of Congress at will affect the legislative process?

Mr. ROSENKRANZ. That is a great question, Mr. Chairman.

The short-term effect is an aggrandizement of the President, but a predictable long-term effect is legislative gridlock. There is every reason to believe that Congress will not be able to reach these compromises if they know that these compromises can be unilaterally rewritten in the White House. There is every reason to believe that Congress will grind to a halt under the threat that President Obama will rewrite its handiwork.

Mr. GOODLATTE. In fact, couldn't you argue that that is, indeed, happening right now, that as you try to work out differences between various perspectives on a piece of legislation, those who may be asked to give something that they think the President agrees with them on might say, well, why should I give on that because I can get that changed or done unilaterally by the executive branch, or the party that wants to achieve that says, well, why should I agree to it because they are not going to enforce that anyway?

Mr. ROSENKRANZ. You could imagine such a negotiation about the effective date of Obamacare, but after the statute is passed, President Obama decides what the effective date is quite regardless of what Congress wants. So gridlock is quite a predictable result.

Mr. GOODLATTE. Professor Turley, the Constitution's system of separated powers is not simply about stopping one branch of Government from usurping another. It is about protecting the liberty of Americans from the dangers of concentrated Government power. How does the President's unilateral modification of acts of Congress affect both the balance of power between the political branches and the liberty interests of the American people?

Mr. TURLEY. Thank you, Mr. Chairman.

The danger is quite severe. The problem with what the President is doing is that he is not simply posing a danger to the constitutional system, he is becoming the very danger the Constitution was designed to avoid, that is, the concentration of power in any single branch. This Newtonian orbit that the three branches exist in is a delicate one, but it is designed to prevent this type of concentration.

There are two trends going on which should be of equal concern to all Members of Congress. One is we have had the radical expansion of presidential powers under both President Bush and President Obama. We have what many once called an imperial presidency model of largely unchecked authority. And with that trend, we also have the continued rise of this fourth branch. We have agencies that are now quite large that issue regulations. The Supreme Court said recently that agencies can actually define their own or interpret their own jurisdiction.

Mr. GOODLATTE. I am going to cut you off there because I have got a couple more questions I want to ask and only 2 minutes left.



But, Mr. Cannon, you have argued that the President is going to spend billions of dollars Congress did not authorize to provide premium assistance tax credits and subsidies on federally run health care exchanges. Could you please quickly walk me through why the President's plan to provide premium assistance on federally run exchanges is indeed illegal?

Mr. CANNON. Well, we called those premium assistance tax credits because that is what the statute calls them, but in effect they are Government subsidies. They are Government spending. And the statute is quite clear. It is clear. It is consistent. It is unambiguous. It was intentional and purposeful when it said that those premium assistance tax credits would be available only to people who purchase health insurance through an exchange "established by the State under section 1311." That is not just one mention of that phrase. The phrase is mentioned several times explicitly and through cross references. The statute is very tightly worded, and it makes clear that those tax credits are available only if a State establishes an exchange itself under section 1311. If the Federal Government establishes a Federal fallback exchange, those tax credits are not available because that exchange is established by the Federal Government under section 1321 as the Obama administration has acknowledged in regulation.

Mr. GOODLATTE. Thank you. I agree.

Professor Rosenkranz, some defenders of the President's unilateral actions have asserted that his actions were merely an exercise of prosecutorial discretion. Are these assertions correct or is there a fundamental difference between prosecutorial discretion and many of the President's unilateral actions?

Mr. ROSENKRANZ. So there are many cases that are close cases. I agree with Professor Turley. But some of these cases are not close. So prosecutorial discretion is one thing, but wholesale suspension of law is quite something else and that is what has happened under Obamacare.

Likewise in the immigration context, kind of case-by-case prosecutorial discretion is one thing, but a blanket policy that the Immigration Act will not apply to 1.8 million people, that is quite something different. This is a scale of decision-making that is not within the traditional conception of prosecutorial discretion.

Mr. GOODLATTE. In fact, the President has taken it a step further and has actually given legal documents to the people in that circumstance, well beyond simply deciding to leave them there and not prosecute them but to actually enable their violation of the law by giving them documents to help them evade the problems that ensue from living in a country that they are not lawfully present.

Mr. ROSENKRANZ. Quite right.

[Disturbance in the hearing room.]

Mr. GOODLATTE. Presently we do not have order in the hearing room. Members of the audience must behave in an orderly fashion or else they will be removed from the hearing room. Rule 11 of the House rules provides that the Chairman of the Committee may punish breaches of order and decorum by censure—

Mr. GOHMERT. Mr. Speaker, could we get security to help?

Mr. GOODLATTE [continuing]. And exclusion from the hearing. The Capitol Police will remove the disruptive members from the audience immediately.

Ms. JACKSON LEE. Would the Chairman yield? Are you allowing some to be able to sit down and therefore comply rather than removing them from the hearing room?

Mr. GOODLATTE. I have conferred with the Ranking Member and since we afforded them that opportunity earlier in the hearing, now they are going to be required to leave.

Ms. JACKSON LEE. Well, my passion is with those who are leaving. Thank you for being here, and I hope that we will come to an understanding——

Mr. GOODLATTE. The gentlewoman is out of order.

My time has expired, and the Chair now recognizes the Ranking Member, Mr. Conyers, for his questions.

Mr. CONYERS. Thank you.

I am interested in the presentation of Professor Lazarus who was explaining some of his differences with the witness to his left, and I would like to ask if he could pick up that line of discussion. We are pleased that you are here because there has been so much excitement or excited rhetoric about where the President and his Administration are going. I have never heard this level of hypothesizing as to where this is all going to take us. And I think it is considerably over the top. I am so glad you are here today, and I would ask you to respond, please.

Mr. LAZARUS. Thank you very much, Mr. Conyers.

The theory that the Affordable Care Act actually intended to cut off the very benefits that the law was passed to create to the very core constituency of needy people that was the target of the law that my friend, Mr. Cannon, came up with is something that no one on either side of the aisle had any idea about when the law was passed. He and some other clever colleagues came up with this theory at least 9 months, I think, after the law was passed, and they are very happy that they did so. They have gloated that their theory, if adopted by the courts, would drive a stake through the heart of Obamacare. That is their words, that it would sink the ACA and threaten its survival.

In fact, however, the law's text does not sabotage the universally acknowledged purpose of ensuring access to health insurance for all the millions of Americans who cannot now afford it. To make their implausible case to the contrary, Mr. Cannon and his colleagues snatch a few isolated words out of context and ignore the rest of this huge statute. But if you look at the entire statute, you quickly have to conclude that the whole text, not just these isolated phrases, harmonize the purpose of the statute with its text, meaning that all Americans who are eligible for the benefits to enable them to afford insurance will be able to have them whether or not they reside in Federal exchange States or State exchange States.

I might add just one quick thing, and that is, so Mr. Cannon and his friends soon realized that their reading of the text did not make sense and hang together. So they came up with an even more head-scratching claim, and that is that the sponsors of the law "intentionally and purposefully designed it to achieve this self-immolation." And Mr. Cannon just referred to that argument.

So what this means, it means that the ACA sponsors actually intended not only to stiff the very people that they wanted to benefit. It actually means that they intentionally handed over to Mr. Cannon's allies in State capitals the stake that he talks about and invited them, if they chose to do so, to drive it through the heart of the ACA. I mean, we have to imagine really—in order for your theory to make sense, one has to imagine Senator Baucus, Senator Murray, Senator Reed, that well-known soft touch, Senator Schumer getting together in a room off the Senate floor and saying I know what we are going to do. We are going to enable all the Republican Governors and State legislators just to decide that the ACA will not work in their States. Unsurprisingly, there is not a single piece of evidence in the legislative record to support this notion, and what is really going on, I am afraid is that having lost politically, having lost in the Supreme Court, the ACA opponents who are clinging to this theory are hoping that the courts will bail them out once again. That is an awfully big political lift. I do not think that the courts are going to do that.

Mr. CONYERS. Thank you so much.

Mr. Chairman, I would ask unanimous consent to put in the record this report by the "New Republic" of November of this year entitled "Obamacare's Single Most Relentless Antagonist," who is our distinguished witness here today.

Mr. ISSA. Reserving. Can I just ask one quick question, Mr. Chairman? Is the "New Republic" doing reports or articles?

Mr. CONYERS. Reports or articles? I cannot tell you. You mean on the one that I am introducing?

Mr. ISSA. Yes, Mr. Ranking Member. I only ask because I am fine to have newspapers and op-eds and so on put in the record. I just want to have them characterized not as a report as though they have some substantive, factual backing.

Mr. CONYERS. Well, I have never been asked this question before.

Mr. ISSA. Only because I am often called the President's antagonist, and I am not sure that a report that left me out would be justified as factual. [Laughter.]

Mr. GOODLATTE. Without objection, the "New Republic" article entitled "Obamacare's Single Most Relentless Antagonist"—and I am sure both the author of the theory with regard to the Federal use of those funds and the gentleman from California would both be proud to have the article in the record, and therefore we will, without objection, make it a part of the record.

[The information referred to follows:]

# NEW REPUBLIC

## Obamacare's Single Most Relentless Antagonist

by Alec MacGillis | November 12, 2013

It's been widely noted that one of the biggest challenges for the Obama administration in setting up the new federal exchange for health insurance was that the project was much bigger than anticipated. Why? Because far fewer states than expected decided to set up their own exchanges—36 of them left the task to the federal government. This meant the feds were left having to pull a huge web of databases, regulations and insurance offerings into healthcare.gov, and that the site was also hit with a greater rate of traffic than it would have been if more customers had gone to exchanges set up by their own states. Meanwhile, some of the states that did set up exchanges (though not all) have been faring far better.

Why did this happen? Why did so many states that fiercely guard their prerogative to handle their own affairs cede control of their health insurance markets to Washington?

Well, a disproportionate share of the credit or blame—depending on how you're looking at it—goes to a person you've probably never heard of: Michael Cannon.

Cannon is a health care policy expert at the libertarian Cato Institute. He is engaging and sharp-witted. He is also an avowed opponent of the Affordable Care Act, and has for several years now been embarked on a legal crusade that, while a ways from triumphing, may have inadvertently played an outsized role in suppressing the number of states setting up their own exchanges, thereby greatly confounding the law's implementation.

Cannon's crusade, which has been joined by Case Western Reserve University law professor Jonathan Adler, is driven by the conviction that there is a debilitating hole in the law: as written, it provides subsidies to help people buy individual health insurance plans only in exchanges set up by the states, not by the federal government. Cannon maintains that this was deliberate, as an incentive to get the states to set up exchanges, and that the federal government is violating the law by offering subsidies on the federal exchange. Defenders of the law say this is hogwash, that the wording flaw he has identified is a semantic oversight, and that it was plainly understood at every step of the law's drafting—to Democrats, Republicans, and budget analysts tallying the law's costs—that the subsidies would be available on the federal exchange. After all, the exchange would collapse without subsidies to help lower and middle-income people afford coverage. For more, see my colleague Jonathan Cohn's summary a year ago.

Cannon's argument has made its way into several lawsuits against the Affordable Care Act, two of which recently surmounted their first hurdle in the courts. But his crusade may have done damage regardless of whether those long-shot lawsuits prevail. To build the legal case, Cannon spent a lot of time traveling around the country during the past few years—with visits to more than a dozen states and calls to far more—explaining to state officials opposed to the law that, if they simply refused to set up exchanges of their own and thereby shunted their citizens onto the federal exchange, they would greatly raise the odds of the law's total collapse if and when the courts agreed with him that the federal exchange couldn't award subsidies.

Cannon was hardly the only activist making the rounds urging states against cooperating with the law—the American Legislative Exchange Council and Koch Brothers-backed Americans for Prosperity were doing so as well. But Cannon's argument undoubtedly helped some states overcome their natural states' rights inclination to handle their business on their own. As he put it in May 2012 in an online symposium organized by Tea Party-affiliated FreedomWorks, "The biggest challenge in convincing states not to create Exchanges is this. Lots of state officials, including conservative ones, have been sold on the idea that 'if we don't create an Exchange, the feds will IMPOSE one on us.'" Among those whom he helped to

dissuade were New Hampshire and Maine, where Politico reported in April 2012 that Cannon's argument was having an impact:

A few weeks later, in May 2012, Cannon celebrated when Chris Christie rejected an exchange for New Jersey, despite having accepted another part of the law, the expansion of Medicaid. "He has used the most powerful tool available to states to block Obamacare, and so he has done the best thing for the state's residents," Cannon said. (Christie on Sunday cited the troubles of the federal exchange as vindicating his decision to send the state's residents into that troubled program rather than setting up a state exchange for them. This logic went unchallenged by his questioner, George Stephanopoulos.)

Tim Jost, a Washington and Lee University professor and one of the leading authorities on the law's implementation, warned against overstating Cannon's role in limiting the number of state exchanges. The biggest factor in states' deciding to leave the task to the federal government, he said, was the 2010 midterm election, which elected Republican majorities in many state capitols and was taken to affirm a general rejectionist attitude toward the law. It was doubtful, Jost said, that states were persuaded to send their citizens into the federal exchange specifically to deny them the opportunity to receive insurance subsidies, under Cannon's reasoning. "I don't know you'll find any indication that states were saying, 'this is a way of screwing citizens out of tax relief,'" Jost said.

Cannon himself is not one to toot his own horn for his role in limiting the state exchanges. "When I was going to the states I got the sense that there were a lot of state officials who knew they wanted to stop this law and didn't know how," he said. "When people like me would go to the states and say they were better off not creating the exchanges, it gave them the information they needed and they didn't." Still, he made clear that he was often the only person on the barricades against the insurance companies, who wanted state-based exchanges because, Cannon said, they'd exert more influence over them than the federal one. "It was very lonely out there," he said. In some states, "I'd be only person testifying against it."

While his focus is still on the lawsuits, Cannon resists open celebration over the early woes of healthcare.gov, though some schadenfreude slips through. "I don't take any satisfaction in any of this," he said. "It was wise for many states not to set up their own exchanges, because now it's clear who's responsible for the problem: the federal government. ... States that refused to create exchanges should be patting themselves on the back for making the right move and keeping the lines of accountability clear."

But Cannon bristles at the notion that what he or anyone else did to argue against the state exchanges or otherwise encourage states to resist the law amounts to sabotage that reduced the law's chances for success. As he tweeted Tuesday morning: "Claims of #ObamaCare 'sabotage' imply that to work, the #ACA requires a level of public support it does not have. What's left to discuss?"

Left unsaid, of course, is the chicken and egg aspect to this defense. No, the law does not have much public support. But its early stumbles are not helping in that regard, and to the extent that the efforts to undermine a law that was duly passed by one branch of government, signed by a second, and upheld by a third have contributed to those stumbles, they have most certainly also fed the disenchantment. Regardless of how the lawsuits turn out, Cannon's mission may already be accomplished.

Source URL: <http://www.newrepublic.com/article/113576/obamacares-web-site-exchange-woes-trace-catos-michael-cannon>

Mr. CONYERS. And I am sorry to disappoint my friend. Your name is not even mentioned in this article.

Mr. ISSA. It is an oversight.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. GOODLATTE. The Chair recognizes the gentleman from Texas, Mr. Smith, for 5 minutes.

Mr. SMITH OF TEXAS. Thank you, Mr. Chairman.

Mr. Chairman, in my judgment, the President has ignored laws, failed to enforce laws, undermined laws, and changed laws, all contrary to the Constitution. It seems to me that the President is trying to make laws by executive decree at news conferences.

But in a 2012 interview, the President said that he could not “wave away the laws that Congress put in place,” and that “the President does not have the authority to simply ignore Congress and say we are not going to enforce the laws that you passed.” Yet, it seems to me that is exactly what he has done.

I would like to address my first question to Professor Turley, Professor Rosenkranz, and Director Cannon. I think I know their answer, but the question is, do you think in fact the President has acted contrary to the Constitution?

Professor Turley, you mentioned that you supported the President’s policies and even voted for him. Yet, you say he has crossed the constitutional line. The legislative process is not an option, and what the President has done is dangerous. So I assume your answer is, yes, the President has acted contrary to the Constitution. Is that right?

Mr. TURLEY. It is. And I would also just add, Congressman, that this was an issue that the Framers considered. You know, 150 years before they drafted this provision, which did not change much in the Committee, this was a fight with James I. The Framers were very familiar with it, and I think that is what gave life to this very clause.

Mr. SMITH OF TEXAS. Thank you.

And, Professor Rosenkranz, do you think the President has acted contrary to the Constitution?

Mr. ROSENKRANZ. Representative, I would say that some of these cases are close cases but some are not. So the wholesale suspension of law, for example, is I would say the paradigm case of a Take Care Clause violation, yes.

Mr. SMITH OF TEXAS. Okay, thank you.

And Director Cannon?

Mr. CANNON. Yes.

Mr. SMITH OF TEXAS. That was quick and easy. Thank you.

My next question is a little bit tougher, and that is what can Congress or the American people do about it. How can we restrain the President from acting in a way contrary to the Constitution? Professor Turley?

Mr. TURLEY. That is, I think, the most difficult question that we face. I have had the honor of representing Members of both parties of Congress and going to the courts. And the courts are quite hostile toward a Member’s standing, for example, when they believe a violation of the Constitution has occurred. It is in fact Member standing that would solve many of our problems; that is, if Mem-

bers could go to the courts and raise violations of the constitution, it would make much of these difficulties go away.

You will note that the Administration has made reference to the fact—and I think they have some support for this—that they doubt people would have standing to challenge many of these acts. So we have something that the Framers would never have accepted, that you can have violations of the Constitution and literally no one can raise the issue successfully with the courts for review.

Mr. SMITH OF TEXAS. Professor Rosenkranz?

Mr. ROSENKRANZ. I am actually not sure I agree with Professor Turley on the standing question. It is quite true that some of these violations may not be amenable to judicial review. Ultimately, though, the check on this sort of constitutional violation is elections. So this is exactly the sort of hearing we ought to be having, exactly the sort of hearing that the electorate ought to be paying attention to for our next round of elections.

Mr. SMITH OF TEXAS. Okay, thank you.

And Director Cannon.

Mr. CANNON. I think there is little that Congress can do if it is divided over the President's abuse of his authority, but fortunately—and as far as judicial remedies go, it is very difficult to challenge an action of the President when he relaxes an obligation on a certain party. It is much easier to find a plaintiff who has standing to challenge an action that imposes new obligations that the legislature never approved.

That is what has happened in the case of the President issuing premium assistance tax credits through Federal exchanges because those tax credits will trigger taxes, penalties, on employers and individuals in those 34 States that have refused to establish an exchange. And a number of those employers and individuals, including two State attorneys general, 15 Indiana school districts, and a dozen or more private employers and private citizens have filed suit, four different lawsuits. In fact, one of them will have oral arguments this afternoon here in Washington, D.C. So there is a judicial remedy for some of these abuses.

Mr. SMITH OF TEXAS. Okay, good. Thank you, Director Cannon.

Thank you, Mr. Chairman. I yield back.

Mr. GOODLATTE. The Chair now recognizes the gentleman from New York, Mr. Nadler, for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Lazarus, Professor Rosenkranz has written in a Wall Street Journal op-ed piece that Abraham Lincoln would not approve of the delay in the employer mandate and contrasts this decision with Lincoln's decision on habeas corpus. Could you comment on the claim that Lincoln would disapprove, and what about the contrast with the suspension of habeas corpus by Lincoln?

Mr. LAZARUS. Yes, I read that article with some amusement, I have to say, Professor Rosenkranz. I think that President Lincoln would chuckle somewhat contemptuously at the notion that there is an equation between suspending the writ of habeas corpus, perhaps the most fundamental guarantee of freedom in our whole system, with a temporary delay in the implementation of a provision that is part of a very complex, new law, which is something that happens under all Administrations, has to happen sometimes for

practical reasons. Why we are making a big fuss about this as a constitutional matter—well, it is not beyond me. I understand why it is being done. If it sounds like politics, that is what it is. But to make that kind of a comparison, Professor Rosenkranz, does not do justice, I think, to your position at Georgetown.

Mr. ROSENKRANZ. May I—

Mr. NADLER. Thank you. No, no. I have too little time for too many questions.

Let me start by saying that I generally in many respects agree with Professor Turley about the growth of the imperial presidency over the last half century or more. I am particularly concerned about the abuse of the war powers by many Presidents, the use of the state secrets doctrine to prevent enforcement of constitutional rights, the dragnet surveillance that we have seen under Bush and Obama beyond the contemplation of the Patriot Act, warrantless surveillance in the Bush administration, and things like that.

I must say that everything we are talking about today is laughable in my opinion in the context of these problems. I am particularly struck by the overwhelming hypocrisy of the claim that the President, in interpreting the law, in refusing to interpret the law in a way that would drive a stake through the law, is not enforcing the law. In demanding that he enforce the law on the dates in a way that the person making that demand says we destroy the law is not taking care that the laws be faithfully executed. I would say it is the other way around, that it is the duty of the President to interpret the law within the boundaries that he has in a way that makes practical the implementation of the law to effectuate the will of Congress. And the fact that people who want to sabotage the law and want the law not to work and make no bones about it say, hey, he is not obeying this particular sentence in order to make the law work—talk about hypocrisy.

Let me ask a question, having made my statement. I want to ask Mr. Lazarus the following question. The District of Columbia Circuit recently in a decision by Judge Kavanaugh recently wrote the following. “The executive’s broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution’s separation of powers. One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior—more precisely, the power either not to seek charges against violators of a federal law or to pardon violators of a federal law.”

Now, this would seem to support broad discretion in the executive branch to set enforcement and therefore nonenforcement priorities of drug, immigration, and other laws. Does it not? And how does that relate to the alleged violation of the Constitution by the President in setting immigration enforcement priorities as was outlined earlier?

Mr. LAZARUS. Well, thank you very much, Congressman Nadler. And of course, what Judge Kavanaugh, who is one of the most respected and most conservative judges on the Federal bench—what he said here is absolutely correct. And the principles that he is enunciating are precisely why a court, if faced with the issue, would undoubtedly uphold as perfectly compatible with the Presi-



dent's discretion in the immigration area, in particular the DACA program that my co-panelists here are claiming is a gross violation of his duty to see that the laws are faithfully executed.

I would like to, if I can, just quote one other authority, and that is the Supreme Court in an important decision about a year and a half ago, a 5 to 3 majority, including Justice Kennedy who wrote the opinion and Chief Justice Roberts opined that, quote, a principal feature of the removal system in the immigration area is the broad discretion exercised by immigration officials. Federal officials, he said, as an initial matter must decide whether it makes sense to pursue removal at all. And they went on to say that discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. And that very recent broad-based decision, like Judge Kavanaugh's remarks, is completely at odds with the critics' cramped interpretation of the President's immigration enforcement and his constitutional authority.

Mr. NADLER. Well, I wanted to ask Mr. Rosenkranz if he agreed with Judge Kavanaugh and the Supreme Court. I will ask unanimous consent for an additional minute so Mr. Rosenkranz can answer that, Mr. Chairman.

Mr. GOODLATTE. Without objection, the gentleman will have an additional 1 minute. Mr. Rosenkranz?

Mr. ROSENKRANZ. I am glad you asked because Judge Kavanaugh also said quite recently in 2013, quote, the President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the executive obviously cannot move forward, but absent a lack of funds or a claim of unconstitutionality that has not been rejected by final court order, the executive must abide by statutory mandates and prohibitions. I think Judge Kavanaugh is exactly right.

Mr. NADLER. Of course, that is not the question. The question was delay here. Thank you.

Mr. GOODLATTE. The Chair recognizes the gentleman from Ohio, Mr. Chabot, for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. Rosenkranz and Mr. Cannon, Mr. Lazarus had commented upon previous writings of yours, but you were not afforded the opportunity to respond. Did you want to take a moment to do that? I will go with you first, Mr. Rosenkranz.

Mr. ROSENKRANZ. Thank you so much.

So there was a comment about an op-ed that I wrote in The Wall Street Journal comparing Lincoln's suspension of habeas with President Obama's suspension of Obamacare. Of course, I agree with Mr. Lazarus that these things are not the same. Habeas and Obamacare are not the same. But what is striking about the comparison is that President Lincoln welcomed the involvement of Congress, welcomed Congress to ratify what he had done, to pass a statute justifying what he had done. He was concerned that perhaps he had overstepped his constitutional authority. He welcomed Congress' ratification of his action. President Obama, by contrast, actually threatened to veto a statute that would have ratified his

action. That I think is the startling contrast that I was trying to bring out in that op-ed.

Mr. CHABOT. Thank you.

Mr. Cannon?

Mr. CANNON. Mr. Lazarus and, whenever this issue comes up of whether premium assistance tax credits are authorized in the 34 States and Federal exchanges, supporters of the Administration, of the IRS's decision to offer them in States with Federal exchanges talk a lot about what Congress must have been thinking or could possibly have been thinking or would they have done this. And there is a reason they do that. It is because the statute is clear and it contradicts what the Obama administration is trying to do.

And unfortunately for the Administration, the legislative history also is completely consistent with the clear language of the statute. Despite 2 years of people like me raising this issue that what the IRS is trying to do is illegal, they have yet to offer one shred of—one statutory provision or one shred of evidence from the legislative history that supports their claim that this statute authorizes tax credits through exchanges established by the Federal Government under section 1321 or that it was Congress' intent for this statute to authorize tax credits through those exchanges.

So there is a lot more to be said about all of this.

If I may, I would like to respond to something that Mr. Nadler—

Mr. CHABOT. No. Let me cut you off at this point. I have only got a limited amount of time.

Mr. Turley, let me ask you this. You had mentioned something along the lines of you were concerned that President Obama is becoming the very danger that the separation of powers was meant to prevent. And Mr. Lazarus mentioned earlier that—I do not know who exactly he is referring to but some are hyperventilating about this whole topic. Would you want to comment on both of those things, either in relation to each other or not?

Mr. TURLEY. Sure. Mr. Lazarus may be responding to my labored breathing with the flu, but it is not my testimony.

The reason I think that we have this disconnect in our view of this clause is that we obviously read the history differently. I view the Constitutional Convention as quite clear. The Framers were students of history, particularly James Madison, 150 years before they took a pen and wrote out this clause, there was a fight with James I about what was called the "royal prerogative." It is very similar to what President Obama is claiming, the right of the king to essentially stand above the law to reform the law to the king's views. Now, I am not saying that President Obama is a monarch. But that was the issue that gave the impetus to this clause in my view. The language of the clause did not change very much.

Later, people like Benjamin Civiletti dealt with this under a different term, the "dispensing power" of the President. And Civiletti wrote a very good paper about when the President could refuse to enforce laws, and he basically said that it could only be done where there is an intrusion upon executive power—and by the way, that is what was involved in the Miers case that we talked about and referred to earlier—or if it was clearly unconstitutional. And that

second issue—he established it had to be very, very clear so the President does not exercise dispensing authority.

So this is how I would respond. We do not have to hyperventilate to look at a problem of this kind and say that this is not about who the President is today or what he is trying to achieve. What is lacking from the other side is any notion of what the world will look like in a tripartite system if the President can literally ignore any deadline in a major piece of legislation, exclude whole classes of people from enforcement. The question is what is left in that Newtonian orbit that Madison described. And I would suggest what is left is a very dangerous and unstable system.

Mr. CHABOT. Thank you very much.

My time has expired. I yield back.

Mr. GOODLATTE. The Chair recognizes the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Lazarus, first of all, on the ACA, it seems to me absurd that the Federal exchanges that are there for all intents and purposes to serve as the State exchange or State marketplace—it would be absurd to interpret that they are there for all intents and purposes except for the purpose of the bill, which is the subsidies. Is that right?

Mr. LAZARUS. It is obviously absurd, Congressman Scott. And therefore, to say that the President is violating his duty to see that the law is faithfully enforced because he interprets the law in a way that is consistent with its purpose and consistent with the known objectives of the Congress that enacted it is also, it seems to me, quite absurd.

Mr. SCOTT. Thank you.

The Congressional Research Service provided several examples in prior Administrations where the IRS delayed enforcement despite a congressionally mandated effective date. Can you say a word about the President's power to delay implementations of provisions particularly when compliance is logistically impossible?

Mr. LAZARUS. Yes. And I think actually despite the sparks that are flying around this room about the President's actions with respect to the Affordable Care Act, really these principles are really quite simple. Several people have noted that the President cannot refuse to enforce a law for policy reasons. It is obviously correct, certainly correct, and it is also obviously not what the President is doing. Does the President have policy objections to the Affordable Care Act? I do not think so. Phasing in the enforcement of major statutes like the Affordable Care Act or the Clean Air Act or other laws, certainly laws that the EPA administers miss statutory deadlines very, very frequently because it is simply logistically impossible to prudently implement them in accord with those deadlines. This is just a tempest in a teapot.

Mr. SCOTT. Thank you.

Mr. LAZARUS. And if I can say one further thing about your first question, Congressman Scott. We should understand what the consequences of Mr. Cannon's interpretation of the ACA would be and why it would drive a stake through the heart of the ACA in every Federal exchange state. It is not just that it would keep maybe 80 percent of the people who were expected to enroll for insurance on

exchanges from being able to afford that insurance. 80 percent. So it would really wreck that part of the program. But actually it would probably just cause the entire individual insurance market, even for people who could afford insurance, to implode because it would so screw up the actuarial calculations. So it really would drive a stake through the heart of the law in those States. And to say that Congress intended—intended—to do that is—I do not know. It is just pretty hard to stomach.

Mr. SCOTT. Thank you.

In November 1999, 28 bipartisan Members of the House wrote the Attorney General a letter and expressed concern that INS was pursuing removal in some cases, “when so many other more serious cases existed.”

How do you set priorities? If the President cannot set priorities in enforcement when there is obviously not enough money to enforce each and every provision to the letter of the law, how do you set priorities if he cannot enforce each and every provision?

Mr. LAZARUS. The answer is it is the essence of the executive responsibility to do just that. And I might note that I think that President Obama has increased the number of deportations, to the consternation of some of his own supporters, a very great deal, as everyone here I am sure is well aware, and my understanding is he has increased it to 400,000 people a year which is nearly four times as many as the number was around 2000. The reason for that is that is all the funds that Congress has appropriated for that.

Mr. SCOTT. My time is about to expire. I wanted to get in one other question. Can you talk about the obligation of the President to defend the Defense of Marriage Act when he believes it to be unconstitutional?

Mr. LAZARUS. Yes. I agree that the President should only very, very rarely and with extremely good reason decline to defend a law in court, and I have written about that. And I think it is hard to fault what the President did in the case of DOMA. He concluded with very good reason that there was simply no argument that could justify DOMA. He notified the Congress of this decision. He continued to enforce it. He invited Congress to intervene in litigation to present that point of view, and ultimately the Supreme Court vindicated his judgment. So it seems to me it is very difficult to claim everyone on all sides of these debates in both parties agrees that the Take Care Clause contemplates that the President may decline to enforce a law which he concludes in a responsible way is unconstitutional.

Mr. CHABOT [Presiding]. The gentleman’s time has expired.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent to introduce into the record the letter I referred to.

Mr. CHABOT. Without objection, so ordered.

[The information referred to follows:]

## Appendix I

**Congress of the United States**  
**Washington, DC 20515**

Embargoed for release Monday  
 November 8, 1999

Contact: Allen Kay  
 Rep. Lamar Smith  
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November 4, 1999

The Honorable Janet Reno  
 Attorney General  
 Department of Justice  
 10th St. & Constitution Ave. NW  
 Washington, DC 20530

The Honorable Doris M. Meissner  
 Commissioner  
 Immigration and Naturalization Service  
 425 Eye Street, NW  
 Washington, DC 20536

Re: Guidelines for Use of Prosecutorial Discretion in Removal Proceedings

Dear Attorney General Reno and Commissioner Meissner:

Congress and the Administration have devoted substantial attention and resources to the difficult yet essential task of removing criminal aliens from the United States. Legislative reforms enacted in 1996, accompanied by increased funding, enabled the Immigration and Naturalization Service to remove increasing numbers of criminal aliens, greatly benefiting public safety in the United States.

However, cases of apparent extreme hardship have caused concern. Some cases may involve removal proceedings against legal permanent residents who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the "aggravated felony" spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States. Although they did not become United States citizens, immediate family members are citizens.

There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship. If the facts substantiate the presentations that have been made to us, we must ask why the INS pursued removal in such cases when so many other more serious cases existed.

## Appendix I, continued

Attorney General Reno and Commissioner Meisner  
November 4, 1999  
Page 2

We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases that have occurred. In addition, we ask whether your view is that the 1996 amendments somehow eliminated that discretion. The principle of prosecutorial discretion is well established. Indeed, INS General and Regional Counsel have taken the position, apparently well-grounded in case law, that INS has prosecutorial discretion in the initiation or termination of removal proceedings (see attached memorandum). Furthermore, a number of press reports indicate that the INS has already employed this discretion in some cases.

True hardship cases call for the exercise of such discretion, and over the past year many Members of Congress have urged the INS to develop guidelines for the use of its prosecutorial discretion. Optimally, removal proceedings should be initiated or terminated only upon specific instructions from authorized INS officials, issued in accordance with agency guidelines. However, the INS apparently has not yet promulgated such guidelines.

The undersigned Members of Congress believe that just as the Justice Department's United States Attorneys rely on detailed guidelines governing the exercise of their prosecutorial discretion, INS District Directors also require written guidelines, both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner. We look forward to working with you to resolve this matter and hope that you will develop and implement guidelines for INS prosecutorial discretion in an expeditious and fair manner.

Sincerely,

  
Rep. Henry J. Hyde

  
Rep. Barney Frank

  
Rep. Lamar Smith

  
Rep. Sheila Jackson Lee

  
Rep. Bill McCollum

  
Rep. Martin Frost

  
Rep. Bill Barakat

  
Rep. Howard L. Berman

## Appendix I, continued

  
Rep. Brian P. Bilbray

  
Rep. Corrine Brown

  
Rep. Charles T. Canady

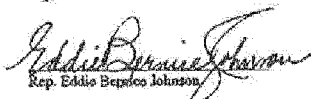
  
Rep. Barbara Cubbin

  
Rep. Nathan Deal

  
Rep. Lincoln Diaz-Balart

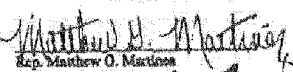
  
Rep. David Dreier

  
Rep. Bob Filner

  
Rep. Eddie Bernice Johnson

  
Rep. Sam Johnson

  
Rep. Patrick J. Kennedy

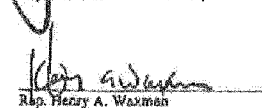
  
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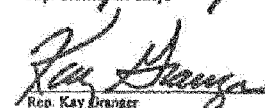
  
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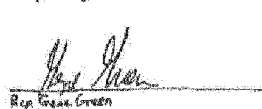
  
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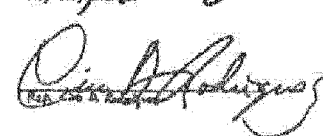
  
Rep. F. James Sensenbrenner, Jr.

  
Rep. Christopher Shays

  
Rep. Henry A. Waxman

  
Rep. Kay Granger

  
Rep. Green Green

  
Rep. Luis G. Rodriguez

Mr. CHABOT. The gentleman from California, Mr. Issa, is recognized.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Lazarus, I hear you on the President deeply believing in his policy, his signature legislation, the Affordable Care Act, but he deeply believes, I am sure, in every item that he wants appropriated from Congress. But 2 years later, it expires. Right? And 2 years later, he cannot just spend money unless he comes back to Congress for more money. Is that not true? That is implicit in the Constitution.

Mr. LAZARUS. I apologize, but I do not really understand the question, Congressman Issa.

Mr. ISSA. When the President's authority has run out, he must come back to the Congress for new authority. In the case of the Affordable Care Act, things which were not in the law have gone wrong. This act, this 2,400 pages that had to be passed and then read, has flaws in it, and these are fatal flaws if not corrected. Isn't that so? Including the absence of an answer to how do you subsidize if in fact a State chooses not to do it.

Mr. Rosenkranz, if the law does not give the President authority and something goes wrong, I am presuming that the Framers always intended that you would come back to the Congress to resolve that need for additional authority. It has happened. It was earlier mentioned Abraham Lincoln came back to have his suspension of habeas—attempt to have it ratified because he knew, even if he did it by executive order, he had limited jurisdiction. He wanted to have it codified.

I think a good example would be McArthur's promise in war. They came back with the Rescission Act in order to undo some of the promises that were made in war to the Filipino people and so on.

Is there anything in the Affordable Care Act that is different than any other time that something that is not in the law occurs that is outside the law that you come to Congress and say I need authority to do X? Please.

Mr. ROSENKRANZ. I quite agree, Congressman. It is really quite startling that this Congress—this House offered to ratify exactly what the President wanted to do, actually passed a bill which would have delayed the employer mandate exactly as the President wanted, and far from welcoming this, the President actually threatened to veto it. To me that is quite startling.

Mr. ISSA. I want to go through a couple things I think we can all agree on and get to something Mr. Turley said. Would you all agree, without further pontificating, that when Andy Jackson heard from the U.S. Supreme Court that he had no right to move Native Americans out of their homes to Oklahoma and he then did it anyway, saying essentially to the Supreme Court you have no army, therefore I am doing it, that he was outside his constitutional authority? You would all agree to that. Let the record show I had all—

Mr. LAZARUS. I certainly would agree to that.

Mr. ISSA. Okay. I had all shaking heads.

When Richard Nixon tried to withhold his tapes, which were essentially evidence of his complicity in the Watergate and the cover-



up and the court ordered those tapes, even after he had fired a number of people and so on, you would all agree that the court's action was appropriate that there was a crime, it went to the White House, and ultimately led to Richard Nixon resigning? You would all agree that it was appropriate, I assume, for the court to intervene in this constitutional dilemma of a President that did not want to turn over evidence related to his crime. Would you all agree?

Mr. LAZARUS. I would.

Mr. ISSA. Good.

And would you all agree—maybe, maybe not—that when President Bush asserted in the Harriet Miers case—and this was referred to earlier—that when Judge Bates essentially said Congress has a need to get people in front of it, whether that person speaks or not, ultimately—and this is Mr. Conyers' case—that in fact the court intervened and said, yes, I have a right to decide and you must produce witnesses. You would all agree that that was a good balance of power decision by Judge Bates. Is that correct in George W.'s case? Okay.

Then on what basis does President Obama say he is above the law when in Fast and Furious he asserted that the court had no right to even decide whether or not a lawfully delivered subpoena should, in fact, be complied with? And in this case, Judge Amy Berman Jackson has ruled that, yes, she has the right to decide it. The question for all of you is if we cannot go to the courts as Congress with our standing after a contempt vote, if we cannot go and get the court to decide the differences between the two branches, then in fact as some of my Democratic friends have asserted, the imperial presidency is complete? Isn't that the most essential item that if in fact we do not have standing, if in fact the court does not have a right to decide, then executive power is essentially unlimited?

Mr. Turley, you have written on this.

Mr. TURLEY. May I answer?

Mr. ISSA. I would ask for 1 minute for full answering.

Mr. GOODLATTE [presiding]. Without objection, the gentleman is granted 1 additional minute.

Mr. TURLEY. I certainly agree that that is part of the problem here, that we have created a system by which Presidents can assert powers that others view as unconstitutional. I think the President is asserting clearly unconstitutional power in this case. And then the Department of Justice proceeds to try to block any effort of judicial review. This Administration has been very successful largely on standing grounds. So there is no ability to challenge these things even if they are viewed as flagrantly in violation of the Constitution.

I will also add with reference to your earlier point one of the things that the courts say when those of us who represent Members go to the court and say the President is acting unconstitutionally—we hear this mantra from the judges saying, well, you have the power of the purse. But in this case, it is the power of purse that is being violated, and we have hundreds of millions of dollars that are being essentially shifted in a way that Congress never approved. And so we have in many ways a perfect storm. Even the power of the purse that is often cited by the courts really does not

mean much if the President can just shift funds unilaterally without any type of review.

Mr. ISSA. Anyone else?

Mr. LAZARUS. I guess the only thing I would say—and I do not claim to be an expert on standing, as I think some of my co-panelists—

Mr. ISSA. I am more interested in the standing of the court, which was the question. Does the Federal court have the right and obligation to make those final decisions on essentially balance of power, and if not, aren't we doomed?

Mr. LAZARUS. Well, I would just say two quick things. I mean, first of all, the courts do not have authority—they have authority under the Constitution to hear cases and controversies, and the courts do not have constitutional authority to decide matters that are not cases or controversies. And that is why we have standing rules.

The second thing I would just say, Congressman—

Mr. ISSA. So refusal to comply with a subpoena would not be a problem. Therefore, Nixon should never have resigned because his tapes never would have been discovered in your example.

Mr. LAZARUS. I do not think that that follows.

Mr. ISSA. He did not turn them over without being ordered to.

Mr. LAZARUS. Yes, he might have.

Mr. ISSA. Mr. Rosenkranz, final.

Mr. ROSENKRANZ. I guess I would just say some of the standing questions may well be tricky, but again the ultimate check on presidential lawlessness is elections and in extreme cases impeachment, but elections primarily should be the check.

Mr. ISSA. So when the IRS prevents the word from getting out by conservative groups, they in fact thwart the election. Therefore, elections are no longer the final answer. Are they?

Mr. ROSENKRANZ. To the extent that the IRS targeting is an example of discriminatory enforcement, you are quite right. It is actually the most corrosive form of a Take Care Clause violation because it does cast doubt on everything that follows, casts doubt on the elections that follow. So you are quite right.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. GOODLATTE. The gentleman from Georgia, Mr. Johnson, is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this very important and significant hearing today.

This hearing is pure political theater. It is a farce plain and simple. It is a comedy but the audience has seen it so many times now that it is no longer funny. In fact, this hearing is an egregious waste of this Committee's time especially when one considers all of the legislation that remains unaddressed by the House like immigration reform. The Senate has passed comprehensive immigration reform, but the Speaker of the House continues to refuse to bring the issue to the House floor.

Yesterday, as House Members walked down the Capitol steps on their way home from an exhausting 1-hour workday, I watched as most Members had their heads down. They wanted to avoid eye contact with the 50 or so young people standing at the foot of the steps in the cold wind. They had their hands clapped together—the

young people—in prayer. Their prayer was on behalf of those families of immigrants that are being destroyed as a result of this Nation's failure to pass comprehensive immigration reform. Their prayer was a simple one, that Speaker Boehner allow the House to vote on comprehensive immigration reform before the end of this session of Congress. The spectacle of those kids shivering in prayer in the cold last night could not be avoided by the Members of Congress. So most kept their heads down probably in shame as they hastily escaped to the safety of their cars.

I suggest that this Committee hold a hearing on the question of why, despite immigration reform being supported by a majority of Americans, having been passed by the Senate and the President having said that he will sign it if it ever gets to his desk—why is it that we cannot bring that measure to the House floor for a vote?

Mr. Chairman, this do-nothing House has only 7 legislative days left before it adjourns for its well-earned year-end holiday. The same Republican Party that has voted 46 times to repeal the Affordable Care Act is today ironically complaining that the President is not implementing the law quickly enough. But at its essence, this hearing sadly is simply a continuation of the majority's overwhelmingly obsessive and insatiable desire to kill the Affordable Care Act which will enable 30 million Americans to have health care—32 million Americans. 46 times they have tried and failed to kill it. The result of this hearing will not change the fact that Obamacare is the law of the land.

And since today we are hearing testimony on the use of executive authority, let's not forget that the key authority for Congress to check the power of the executive is its Article I authority over appropriations. And by the way, this Congress has not yet passed a budget. Congress continues to shirk its constitutional duties under Article I, funding the Government through short-term resolutions is not leadership and the American people deserve better.

So after holding yet another hearing to obstruct this Administration, perhaps this Committee can also take up the question of Congress' duties under Article I in a hearing entitled "The Congress' Constitutional Duty to Appropriately Fund."

Now, as far as the Affordable Care Act is concerned, the individual mandate is constitutional. It will reduce costs, prohibit discrimination against patients with preexisting conditions, and extend coverage to the uninsured. It will extend coverage to 32 million Americans. The individual mandate is the key to this legislation being successful. It will ensure that millions of Americans will not have to worry about being denied health care because of a current medical condition or a fear that their coverage will be capped if they get sick.

To the Members who have served longer than I on this Committee, I invite you to look back to 2003 when a Republican-led Congress enacted the law creating the Medicare prescription drug program. Most Democrats voted against the bill in 2003. The program was also very unpopular with most Americans, but Democratic Members worked hard when the program was implemented in 2006 and 2007 to make sure that their constituents received the full benefits of the program. It is unfortunate that the Republicans today are not doing the same thing.

Mr. Lazarus, this is not the first Administration to temporarily postpone the application of new legislation. How have prior Republican and Democratic administrations treated the implementation of statutes when statutory deadlines become unworkable?

Mr. GOODLATTE. Without objection, the gentleman will have 1 additional minute to allow Mr. Lazarus the opportunity to respond.

Mr. LAZARUS. I will try not to take the whole minute. The answer is that prior Administrations have done just what this Administration is doing because they have to. I quoted President Bush's Secretary of Health and Human Services, Michael Leavitt, in saying that the President's current decision to delay the employer mandate was wise, and he said that and then cited his own experience in phasing in Medicare Part D, the prescription drug benefit program.

The Environmental Protection Agency under all Administrations faces statutory deadlines that cannot be met. We all know that. The Bush administration was often chastised by environmental groups for missing statutory deadlines and the environmental community charged and charged in court, in fact, that the Bush administration was using delays as a cover for simply suspending the law as a de facto matter. I do not know what the basis for that was or was not.

Of course, again if a President refuses to enforce a law for policy reasons, that is a violation of his "take care" duties, but that is not what is going on here.

Mr. JOHNSON. Thank you.

I yield back.

Mr. GOODLATTE. The Chair recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for your testimony. This has been one of the most interesting that I have been seated here more than a decade on this Committee.

As I listened, I listened to Mr. Lazarus and often your dialogue goes to the policy effect of this rather than being tied to the constitutional language or the statutory language, although you have referenced both. I am curious as to what you think the limited powers of the President might be given you grant him such latitude to amend Obamacare, extend the statutory deadline because it conforms with the broader intent of the law and your reference to the intent of Congress that they really intended to allow for the application of taxes and the distribution of refundable tax credits even though Mr. Cannon testifies that that is not in the section that applies.

So from a broader perspective, could you tell me how you think the President's powers are limited? And I would maybe just ask, does he have the power to lay and collect taxes?

Mr. LAZARUS. Well, first of all, I think that the President's powers are limited by what the statute provides, and I think I have said several times I agree entirely that the President cannot simply refuse to apply or enforce a law for policy reasons.

Mr. KING. But can he regulate commerce, for example?

Mr. LAZARUS. The President is obligated to phase in a new law.

Mr. KING. I am sorry, Mr. Lazarus. I hear that. But I am trying to get to the constitutional limitations that you think the President has.

Let me just bypass the enumerated powers with the exception of what would happen—and I am concerned about Mr. Turley's statement that we get into a pretty dangerous area here if we do not have constitutional limitations. What if we just leap to the end of this thing? What if the President declared war? What if he assumed that authority? What is the recourse then? What would your counsel be to this Congress if we objected to such a thing or even if we objected to it on purely constitutional grounds and we thought it was a good policy decision and vetoed our resolution to declare war? That should get us to the bottom of this discussion.

Mr. LAZARUS. Well, the President does not have the authority under the Constitution to declare war.

Mr. KING. Correct.

Mr. LAZARUS. The Congress does. The Congress has not been enormously eager to exercise that authority in my lifetime. But that is a very complicated subject and it is the subject of—

Mr. KING. Thank you, Mr. Lazarus.

Mr. LAZARUS [continuing]. Interplay between Congress and the executive branch. There is a War Powers Act. There are disputes about—

Mr. KING. Let me then pick it up from there. I am illustrating this point that if there is an incremental march down through, is the President overreaching his constitutional authority in my opinion and I think the opinion of many people on this Committee in this room. He could assume among that any of the enumerated powers, and the recourse that Congress would have—all the way down to the declaration of war—and the recourse that Congress would have would be pass a resolution of disapproval or we could shut off the funding through the power of the purse. And the President has already assumed the power of the purse. So the next recourse is go to the courts, and if we find out that the courts do not grant standing for Members of Congress, then the next recourse is, I think as Mr. Rosenkranz said, the word that we do not like to say in this Committee and I am not about to utter here in this particular hearing.

The balance I want to come to is ask Mr. Cannon this question. The frustration of this balance of power is because of the disrespect for the various branches, the competing branches, of Government that come. And I will argue that the Founding Fathers envisioned that each branch of Government would jealously protect its constitutional power and authority, and that static balance that would be there would be the definition of a brighter line between the three articles of the Constitution.

But what then finally resolves this? I know we said elections. If the elections are affected by decisions of the executive branch, what do the people do who are the final arbiters of this definition of the Constitution if they are even frustrated by the election?

Mr. LAZARUS. Is this to me or—

Mr. KING. I am asking Mr. Cannon, please.

Mr. CANNON. I think it was to me. And you are asking if there is no judicial remedy and there is no electoral remedy, what do the people do? To what particular sort of abuses are you—

Mr. KING. Any one of the list of the enumerated powers, for example, ending with the declaration of war because that is the starkest of all.

Mr. CANNON. There is a procedure in the Constitution that allows the people to amend the Constitution without going through Congress. That is another method where the people can try to restrain the executive.

Mr. KING. May I suggest then if that should happen, why would an executive with such disrespect for the Constitution today honor an amended Constitution from a constitutional convention?

Mr. CANNON. That is an excellent question.

Mr. KING. I would like to turn to Mr. Turley and ask him if he has had a chance to reflect upon that earlier statement of the situation that we are in and where this goes. We need to look into this future. I would ask unanimous consent for that additional minute. I ask each of the witnesses to tell us what does America look like in the next 25 years if we have executive upon executive that builds upon this continual stretching or disregard of the constitutional restraints and the disrespect for Article I. I would start with Mr. Turley.

Mr. GOWDY [presiding]. You may answer the question as quickly as you can.

Mr. TURLEY. I really have great trepidation over where we are heading because we are creating a new system here, something that is not what was designed. We have this rising fourth branch in a system that is tripartite. The center of gravity is shifting, and that makes it unstable. And within that system, you have the rise of an uber-presidency. There could be no greater danger for individual liberty. And I really think that the Framers would be horrified by that shift because everything they have dedicated themselves to was creating this orbital balance, and we have lost it.

Mr. ROSENKRANZ. As I have said before, I think the ultimate check is elections. But I do not think you should be hesitant to speak the word in this room. A check on executive lawlessness is impeachment, and if you find that the President is willfully and repeatedly violating the Constitution, if on your hypothetical he were to declare war, I would think that would be a clear case for impeachment.

Mr. LAZARUS. Well, I guess this is the first time I have heard anyone complain about the possibility that this President is going to unilaterally declare war and be over-aggressive about that. I do not really think that is much of a description of his foreign policy.

But the Congress has lots of power if it chooses to use it. The power of the purse is an enormous power. And I think that if I were you, I would find ways to influence policy using the Congress' powers, which you are not doing. I mean, for example, we are hearing complaints about the President's actions to not enforce deportation against certain classes of immigrants. You know, instead of complaining about that, this Committee could hold a markup and report out a comprehensive immigration reform bill, send it to the floor.

Mr. GOWDY. Mr. Lazarus, you are—not you but the questioner is 2 and a half minutes over. So if you can dispense with giving us advice on what our legislative agenda should look like and answer the question, I would be grateful to you.

Mr. LAZARUS. Well, but that is an answer. I think the Congress has a lot of power and it can use it.

Mr. GOWDY. Okay. And I assume that the failure to exercise is also an exercise of power, the failure to act.

Mr. CANNON, would you like to briefly answer?

Mr. CANNON. Maybe Mr. Lazarus knows better than I do how many bombs the President has to drop without congressional authorization before that becomes war. I do not know the actual number.

But I think what Mr. King was getting at is there is one last thing to which the people can resort if the Government does not respect the restraints that the Constitution places on the Government. Abraham Lincoln talked about our right to alter our Government or our revolutionary right to overthrow it, and that is certainly something that no one wants to contemplate.

But as I mentioned in my written and my delivered testimony, if the people come to believe that the Government is no longer constrained by the laws, then they will conclude that neither are they. That is why this is a very, very dangerous sort of thing for the President to do, to wantonly ignore the laws, to try to impose obligations on people that the legislature did not approve.

Mr. KING. An excellent conclusion.

Thank you, Mr. Chairman. I yield back.

Mr. GOWDY. The Chair would now recognize the gentleman from Pennsylvania, former United States Attorney, Mr. Marino.

Mr. MARINO. Thank you, Chairman.

Professor Lazarus, you made a statement about—at least I inferred, about this being political. I want to assure you that I left a lucrative law practice to come to Congress in 2011 because I continually see the eroding of the Constitution. I am a constitutionalist. It is what protects us. So I am not here for the pomp and circumstance, for the notoriety or to promote my career. I am here because I am concerned about the future of my children and the Constitution. So I want to make that perfectly clear.

Number two, you made a comment, and again I inferred that the intent was not an issue or was an issue in part of the Affordable Care Act. And I do not want to get into the details of that, but I find that interesting that you made intent the issue when the Speaker of the House at that time, Nancy Pelosi, said we have to pass it before we know what is in it. Okay? So let's get real about this.

Now we are finding what is in it or what is not in it, and I am hearing consistently from my constituents, small businesses, how this is destroying them. Let me be the first to say that I think everyone needs health care, and those that cannot afford it—we that can afford it have to help those individuals. I firmly and truly believe that.

So with that, I would like to read you something. I am not a constitutional expert, but I loved constitutional law. I follow constitu-

tional law ad nauseam. Just ask my wife. I am always talking about constitutional law.

But in *Federalist No. 51*, it said, what is government itself but the greatest of all reflections on human nature? And it referred to—but the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others. And the Government was set up to specifically prevent that.

And the problem is I am seeing here not only in this Administration but in the previous Administration and several Administrations the executive branch is taking for granted that they have exclusive power over issues that they do not. And I am concerned about that and what do we do to prevent that. But where does it stop?

Here is my question. We have seen the President and past Presidents concerning the Wars Powers Act, which I think violated the Constitution. But this Administration stopped enforcement of detaining illegal immigrants, stopped enforcement of drug laws. I know that because I am a prosecutor. I saw it. Stopped enforcement of mandatory sentencing, stopped parts of Obamacare, the Benghazi issue, the AG being held in contempt, the IRS issue. How many more things do you think have to occur?

And I am thinking like a prosecutor. One of those in and of itself is not enough evidence. Two of those in and of itself is not enough evidence. But the violations that I see here that I just listed—and there are many more—I think is enough evidence to start asking questions. Where do you see the line drawn in what I have recited here as enough evidence to start asking questions about Presidents exceeding their power?

Mr. LAZARUS. Well, first of all, Congressman, I cannot address all of the—

Mr. MARINO. And I do not expect you to.

Mr. LAZARUS [continuing]. Things that you have raised. But many of those things—I mean, let's be honest about it—are honest disagreements about policy or about how to interpret the law.

Mr. MARINO. So your interpretation of the law—you are saying you do not agree with the way perhaps I am interpreting the law. So you say I am wrong.

Mr. LAZARUS. No. Just to finish the sentence, raising the specter of some kind of grotesque presidential assertion of unwarranted authority here is just not based on fact. Mr. Cannon, for example, strongly believes that his interpretation of the law, which would sink Obamacare in his view, is correct, or I guess he does. The President disagrees with that. The President has very good reason to disagree with that. So to say that he is not taking care that the—

Mr. MARINO. Let me reclaim my time here.

But when laws are enacted, they should be followed to the letter, and it is not being done here. I have heard you raise the issue of, well, prior Administrations have done it. To me that is no excuse not to pursue this from a congressional standpoint because whether it is Obamacare, whether it is the War Powers Act, whether it is



going into Iraq, these are all issues that I am deeply concerned about.

So you criticized and you have made some, I think, remarks. I do not think you take some of this seriously of what your colleagues have to say up there. So give me an answer as to what you think we need to do to curtail the executive power the way I think it has been abused over the years.

Mr. GOWDY. You may answer the question quickly.

Mr. LAZARUS. Well, I think you can pass legislation to overturn an executive action you disapprove of. You can withhold funds for it.

Mr. MARINO. Well, let me ask you—show something right there that you are not reciting either. 94 percent of Obamacare is mandatory spending, and the Democrats passed that unanimously without any votes from the Republicans. So it is mandatory spending. Nothing can be done about that at this point. It is the law.

And I yield back my time. Thank you.

Mr. GOWDY. I thank the gentleman from Pennsylvania.

The Chair will now recognize the gentleman from New York, my friend, Mr. Jeffries.

Mr. JEFFRIES. I thank the distinguished Chair, as well as the distinguished Ranking Member for his leadership, and the panelists for their participation this morning.

If I could just start with Professor Rosenkranz. And I want to explore this issue of prosecutorial executive branch discretion particularly in the context of the enforcement of our Nation's immigration laws. But if I can just start with some foundational questions.

The Department of Justice, for example, is an executive branch agency. Correct?

Mr. ROSENKRANZ. Yes.

Mr. JEFFRIES. And Federal prosecutors within the Department of Justice are exercising executive branch action in the context of their participation in the criminal justice system. Correct?

Mr. ROSENKRANZ. Are exercising executive authority, yes.

Mr. JEFFRIES. Executive authority.

Now, when prosecutors make a decision, after initially charging someone with a serious offense and then agree to a plea bargain to a lesser included offense, short of what they may have concluded the evidence provides that particular defendant was guilty of, is that an appropriate exercise of prosecutorial discretion within the four corners of the Constitution?

Mr. ROSENKRANZ. Well, I guess it depends on the circumstances of your hypothetical. It would not be appropriate if it were, for example, motivated by race or something, but on the facts you have described, if the prosecutor thought he did not have the resources to prosecute a particular crime or perhaps was not sure that he had the evidence for a particular element of the crime, then yes, that is an appropriate exercise of discretion.

Mr. JEFFRIES. And the executive branch in the prosecutorial context, for instance, the Department of Justice or in the immigration context within Homeland Security—they have an ability to prioritize the nature of the offenses that they enforce. Is that correct? As an appropriate exercise of their constitutional authority.

Mr. ROSENKRANZ. The executive branch has authority to husband its resources in the most efficient way that it sees fit. So the President does not have the money or resources to completely execute every law, and so he does have to, by necessity, make decisions about enforcement priorities, yes.

Mr. JEFFRIES. Now, so you have concluded, I believe, that the presidential exercise of authority in the DACA context with respect to deferred action, a certain class of individuals—do you believe that that is an unconstitutional exercise of his authority?

Mr. ROSENKRANZ. Sorry. In the immigration context?

Mr. JEFFRIES. In the immigration context.

Mr. ROSENKRANZ. Yes, I do.

Mr. JEFFRIES. And you believe that is the case because of the fact that you contend it was a wide-ranging exercise that was not made on a case-by-case basis? What is the foundation of your belief that it is unconstitutional?

Mr. ROSENKRANZ. I think there are two basic reasons. One is that it goes dramatically further than the hypotheticals we were discussing before. This is not a prosecutor deciding on a case. This is a President deciding on 1.8 million cases.

And the second striking thing about it is the President deciding on exactly the set of cases that Congress considered exempting and decided not to exempt. That is what is particularly shocking about it.

Mr. JEFFRIES. Reclaiming my time, you are familiar with the criteria that has been set forth for the determinations that are made, I believe, on a case-by-case basis as it relates to who qualifies for this deferred action. Are you not?

Mr. ROSENKRANZ. Yes.

Mr. JEFFRIES. So, for instance, one of the criteria, you must have entered the United States before their 16th birthday and be younger than 31 as of June 15, 2012. That is one particular criteria.

Another is cannot have convictions of any felony offense, significant misdemeanor, or have committed any three misdemeanor offenses.

Those are pretty specific enumerated categories.

But another category which helps to determine whether discretion is appropriate is you cannot pose a threat to public safety or national security. Isn't that a pretty broad category within which discretion can be exercised on a case-by-case basis as to whether in fact you pose a threat to public safety or national security, that that is not a specifically constrained factor that people either automatically fall within or automatically fall without?

Mr. ROSENKRANZ. Well, I think it is quite a dramatic shift in the status quo. So 1.8 million will presumptively be allowed to stay. I cannot imagine that but a tiny fraction of them will be found to fall within that exception.

Mr. JEFFRIES. Okay. And I would just note that of these individuals, more than 450,000 have been granted deferred action, but in excess of 100,000 have been denied access or have not received that grant of discretion.

And I yield back.

Mr. GOWDY. I thank the gentleman from New York.

The Chair will now recognize himself for 5 minutes of questions.

It strikes me that the law can require action or forbid action. The law can forbid the possession of child pornography. The law can, in some instances, require you to file an income tax return.

Mr. LAZARUS, is the chief executive constitutionally capable of ignoring both categories of law?

Mr. LAZARUS. Well, as I said several times, Congressman Gowdy, the President cannot refuse to apply or enforce a law for policy reasons.

Mr. GOWDY. Well, let's analyze that for a second. The Congress decided in its collective wisdom that if you possess X amount of a controlled substance, you are going to get X amount of time in prison. You may like mandatory minimums; you may not like them. This Administration summarily dispensed with that law.

So my question to you again is, can the chief executive fail to enforce categories of law that are both permissive and mandatory?

Mr. LAZARUS. It is well established that the executive branch has prosecutorial discretion to decline—

Mr. GOWDY. And what are the limits of that prosecutorial discretion?

Mr. LAZARUS. You know, very frankly I am not an expert on that.

Mr. GOWDY. Well, let me ask you this. Let's assume that a statute required you to show two pieces of identification to purchase a firearm. Can the chief executive knock that down to one?

Mr. LAZARUS. I guess I'd have to know a little bit more, but I would—

Mr. GOWDY. It is a very simple fact pattern. You have to show two forms of ID to possess or purchase a firearm—to purchase a firearm. Can the chief executive under his pardon authority or his prosecutorial discretion authority knock that down to just one form of identification?

Mr. LAZARUS. Well, I am not aware of limits on the President's pardon authority.

Mr. GOWDY. So you would say he could.

Mr. LAZARUS. Under the pardon authority, the President can pardon just about anyone, not that he should—

Mr. GOWDY. Even before the act is committed?

Mr. LAZARUS. That is the reason for—

Mr. GOWDY. Can he do it before the act is committed? That is my question.

Mr. LAZARUS. I am sorry?

Mr. GOWDY. Can he do it before the act is committed?

Mr. LAZARUS. Again, that is above my pay grade. I do not really know that.

Mr. GOWDY. If the President can fail to enforce immigration laws, can the President likewise fail to enforce election laws?

Mr. LAZARUS. Did you ask whether the President can pardon someone before a prosecution is initiated or before an act—

Mr. GOWDY. Well, I think I know the answer to that question. My question was before the act was committed. He certainly can before prosecution.

My question is this. If you can dispense with immigration laws or marijuana laws or mandatory minimums, can you also dispense with election laws?

Mr. LAZARUS. Again, I think we have gone over this ground many times.

Mr. GOWDY. Well, just humor me. Let's do it one more time. Can the President suspend election laws?

Mr. LAZARUS. No.

Mr. GOWDY. Why not? If he can suspend mandatory minimum and immigration laws, why not election laws?

Mr. LAZARUS. Because we live in a Government of laws, and the President is bound to obey them and apply them.

Mr. GOWDY. Well, he is not applying the ACA, and he is not applying immigration laws, and he is not applying marijuana laws, and he is not applying mandatory minimums. What is the difference with election laws?

Mr. LAZARUS. We have a disagreement as to whether, in fact, he is applying those laws. My view is that he is applying those laws.

Mr. GOWDY. Did Eric Holder instruct his prosecutors to no longer follow the mandatory minimums with respect to charging decisions?

Mr. LAZARUS. This is an area where I really do not know nearly as much as you do, Congressman.

Mr. GOWDY. I would find that shocking that anybody would not know more than I do on any topic.

Do you want me to ask Professor Turley?

Mr. LAZARUS. I would say that my impression is that he is not exactly doing what you have just said.

Mr. GOWDY. Well, tell me how I am wrong because Eric Holder sent out a memo that we are no longer going to put in the indictment the drug amounts.

Do you agree with me that Congress can pass mandatory minimums?

Mr. LAZARUS. Constitutionally? Yes.

Mr. GOWDY. Do you agree that Congress can pass statutory maximums?

Mr. LAZARUS. Pardon me?

Mr. GOWDY. Can Congress also pass statutory maximums? In other words, you cannot get more than 30 years for a crime.

Mr. LAZARUS. Of course.

Mr. GOWDY. Can a President exceed a statutory maximum?

Mr. LAZARUS. Can he extinguish did you say?

Mr. GOWDY. No. Can he exceed it?

Mr. LAZARUS. Can he exceed it? Well, how would he do that? You mean keep someone in prison beyond his prison term.

Mr. GOWDY. Well, if you can put him in prison for less time than Congress says is the law, can you also do it for more time than Congress says is the law?

Mr. LAZARUS. You know, this is kind of fruitless because it is an area that I really do not know—

Mr. GOWDY. Professor Turley, what are the limits of prosecutorial discretion? And if the President can suspend immigration laws, marijuana laws, why not election laws?

Mr. TURLEY. Well, I think that some of these areas, I cannot imagine, can be justified through prosecutorial discretion. It is not prosecutorial discretion to go into a law and say an entire category of people will no longer be subject to the law. That is a legislative

decision. Prosecutorial discretion is a case-by-case decision that is made by the Department of Justice. When the Department of Justice starts to say we are going to extend that to whole sections of laws, then they are engaging in a legislative act, not an act of prosecutorial discretion. Wherever the line is drawn, it has got to be drawn somewhere from here. It cannot include categorical rejections of the application of the law to millions of people.

Mr. GOWDY. Well, my time is up, but I would just tell you that I always thought prosecutorial discretion was an individual prosecutor determining whether she or he has enough facts to substantially result in a conviction on a case-by-case basis. If a President is ignoring entire categories of the law, whether it be immigration, marijuana, mandatory minimum, the ACA, what is the remedy for the legislative branch?

Mr. TURLEY. Well, first of all, the first part of the question is—as you may know, I do criminal defense work. I would never go to a prosecutor and say I want your prosecutorial discretion to say that the entire class of which my client belongs cannot be subject to this law because prosecutors would look at me and say are you insane. I am not Congress. So I would not even raise the question.

Now, in terms of where we go from here, I am not too sure because the great concern I have for this body is that it is not only being circumvented but it is also being denied the ability to enforce its inherent powers. Many of these questions are not close in my view. The President is outside the line. But it has to go in front of a court, and that court has to grant review. And that is where we have the most serious constitutional crisis I view in my lifetime, and that is, this body is becoming less and less relevant.

Mr. GOWDY. With that, we will recognize the gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank the majority and the minority, Mr. Conyers, for holding this hearing.

Let me thank the witnesses. Whenever witnesses come before our body, it is of course valuable and we trust your judgment, although we may disagree with you vigorously.

Let me say that the wasteland that Mr. Lazarus spoke of—and, Mr. Lazarus, please let me cite you and indicate that I will be using this across the land, the vast lands of this Nation, which is a rhetorical make-waste that this hearing equates, but also to suggest that the reason why this body that Professor Turley has suggested may be on the verge of some basis of irrelevancy, which I take issue with, is because under the present House leadership, we have passed no legislation for the President to be able to implement in the first place. We have not passed immigration reform. We have not dealt with the question of mandatory minimums. We have not dealt with a budget process. We have not dealt with sequester. If we would simply do our job, the relevance to the American people would exceed our expectation.

I just came from the Fast for Families. Just a few hours ago, we had in this room DREAMers. As far as I am concerned, the duty of the President is to be the ultimate giver of relief within the context of the Constitution and the necessary relief of the people who are begging for relief. If you read the lines that we are so intellectually gifted to interpret, along with precedents, it says that he

shall take care that the laws be faithfully executed and shall commission all of the officers of the United States. Well, I could be a believer, and therefore, my faith says that the President is taking, within the context of the laws, the ability to implement to help the most vulnerable. And what we are doing here is a rhetorical wasteland of ignoring the pain of our Nation.

And let me give you an example. First of all, my good friend from South Carolina knows full well as a Federal prosecutor that each day prosecutors are making distinctive decisions about who to prosecute and how within the context of the law.

And to answer the question for you, Mr. Lazarus, the issue is that in election laws you follow the law, but you have the right in a prosecutorial posture to determine whether you are prosecuting or not. That is what happened with mandatory minimums. That is what is happening with the issue of drugs. That is what the Attorney General is speaking of. He is not throwing laws to the wasteland. We are in this hearing, for it has no sense to it.

And then it is interesting that we have not understood the question of the Secretary of Homeland Security. She issued a memo to her staff. She has an inherent authority to deal with policy. Each of the deferred adjudications or the deferments for DREAMers is individually assessed. What is the constitutional gobbledygook talking about? They do not understand the difference between policy and the ability to do that?

And so I have had DREAMers come to my office. I could not waive a magic wand. They had to go through the process. The memo indicates that it went to CBP, ICE, immigration enforcement, and others.

And so I am taken aback that this issue does not come with humanitarianism, and that if there should be a hearing, it should be a hearing of the failure of this Congress to act on its constitutional responsibilities.

Let me ask on the Affordable Care Act, which is now just another way, if I might say so, of having the 50th and the 52nd and the 53rd challenge on the Affordable Care Act. Mr. Lazarus, to go back to a comment about these exchanges, another wasteland, that if your State does not have an exchange, just on practical English, it means that you in the State cannot comply, meaning you, the citizen, are left in a wasteland of noncompliance, what do you get on? And so we have established the national exchanges. Would we have preferred to have State exchanges and to have a list of State insurers? Yes. Would we prefer for Republicans not to encourage young people not to do what is best for them by getting covered? Yes.

But my question is if the directive is to run such exchanges, that means the same characteristic, Federal exchange, including the tax credit that allows poor people to have insurance, obviously, these are allowed. I am sort of coming in the middle of my question, Mr. Lazarus. This is for you. In essence, in States that have refused exchanges, the Federal Government stands in the shoes of the States. Does that not further illustrate why you, not Mr. Cannon, are correct based on the pure text of the law and that the President is carefully, faithfully implementing the law? Would you go over that for us again so that it can be in the record?

Mr. LAZARUS. Well, that interpretation is what I support, what the President, and the Administration supports, and what I think will certainly prevail in court, and that is that what the law provides is that if a State declines to set up an exchange, then the Federal Government shall establish such exchange. It says such exchange in the law. And as you just stated in common sense terms, the Federal Government then will stand in the shoes of the State in operating that exchange and the exchange will be exactly the same, have all the same powers, authorities, and responsibilities that an exchange that is being managed by a State government would have. Any other interpretation, the one that my friend, Mr. Cannon, here is promoting so vigorously, makes no sense and would actually cause the whole exchange part of the ACA to fail in every one of these States. So it makes no sense whatsoever I think.

Ms. JACKSON LEE. May I just have an additional 30 seconds? He did not answer. Does this not exceed—

Mr. LAZARUS. I am sorry.

Ms. JACKSON LEE. Does this not exceed the authority of the President—

Mr. GOWDY. We are already 2 minutes over. So if you could give us a very pithy response, it would be great.

Ms. JACKSON LEE. You are very kind, Mr. Chairman. Thank you, Mr. Chairman.

Mr. Lazarus?

Mr. LAZARUS. I think the President is not violating his “take care” responsibilities by acting on the interpretation.

Ms. JACKSON LEE. And do you associate with my interpretation of the statements I made previously?

May I ask for a submission into the record? I am finished.

Mr. GOWDY. You can submit all your questions for the record.

Ms. JACKSON LEE. No, no. May I just submit a document of an op-ed—

Mr. GOWDY. Without objection.

Ms. JACKSON LEE [continuing]. Dated August 15, 2007 by myself on signing statements? I ask unanimous consent.

Mr. GOWDY. Without objection.

[The information referred to follows:]

OP-ED  
BY  
CONGRESSWOMAN SHEILA JACKSON LEE

**“CONGRESS MUST ACT TO PRESERVE THE AMERICAN SYSTEM  
OF SEPARATED POWERS AND CHECKS AND BALANCES BY  
PROHIBITING COURTS AND AGENCIES FROM CONSIDERING  
PRESIDENTIAL BILL SIGNING STATEMENTS WHEN  
CONSTRUING ACTS OF CONGRESS”**

**AUGUST 15, 2007**

One of the most important actions the Congress should take when it returns from the August recess is to move swiftly to check the systematic attempt by the current Administration to concentrate power in the executive branch of the federal government. From conducting warrantless wiretaps to extraordinary rendition to secret prisons abroad to presidential bill signing statements, the Bush Administration has revealed itself as unrelenting foe of the system of checks and balances and separated powers so carefully crafted by the Framers.

Nowhere is this contempt for the constitutional structure that is part of the American birthright demonstrated more clearly than with respect to the abuse and misuse of presidential signing statements.

Presidential signing statements seek to alter Congress' primacy in the legislative process by giving the President's intention in signing the bill equal or greater standing to Congress' intention in enacting it. This would be a radical, indeed revolutionary, change to our system of separated powers and checks and balances.

Bill signing statements eliminate the need for a president ever to exercise the veto since he could just reinterpret the bill he signs so as to make it unobjectionable to him. Such actions deprive Congress of the chance to consider the president's objections, override his veto, and make it clear that the president's position is rejected by an overwhelming majority



of the people's representatives. Since few presidents wish to suffer a humiliation so complete and public they have strong incentive to work closely with the Congress and are amenable to negotiation and compromise. This is precisely the type of competitive cooperation the Constitution contemplates and which bill signing statements threaten.

While it is true that presidents have used signing statements since the Monroe Administration, they really came to prominence during the administration of Ronald Reagan, who issued 276 signing statements, 71 of which (26%) questioned the constitutionality of a statutory provision. The goal, as articulated by Samuel Alito, then an obscure Department of Justice lawyer and now an Associate Supreme Court Justice Samuel Alito, was to establish the signing statement as part of a statute's legislative history which courts would use in interpretation.

The record of the Bush Administration has taken bill signing statements to the extreme. In less than six years, President Bush has issued more than 125 signing statements, raising more than 800 constitutional objections. This is almost 500 more constitutional objections interposed by in the 20 year period between 1981-2001 by the Reagan, Clinton, and first George Bush Administrations.

Not coincidentally, President Bush's signing statements have challenged the constitutionality of extremely high-profile laws such as the reporting provisions under the USA PATRIOT Act of 2005, and the McCain Amendment prohibiting torture. The president's statements have essentially asserted that President Bush does not believe that he is bound by key provisions of the legislation. They seek to further a broad view of executive power and President Bush's view of the "unitary executive," pursuant to which all the powers lodged in the Executive and administrative agencies by Congress is somehow automatically and constitutionally vested in the President himself.

In most cases, President Bush's signing statements do not contain specific refusals to enforce provisions or analysis of specific legal objections, but instead are conclusory assertions that the president will enforce a particular law or provision consistent with his constitutional authority, making his true intentions and scope unclear and rendering them difficult to challenge.

What makes President Bush's use of presidential signing statements doubly problematic is his demonstrated and documented reluctance to raise his constitutional objections in a veto message to Congress, as contemplated by the Constitution. Indeed, to date, more than half-way through his second term, President Bush has only vetoed two bills (both relating to embryonic stem cell research), notwithstanding the more than 800 constitutional objections he has raised during this same period of time.

The president is trying to game the system. Rather than risk a showdown with the Congress over some claimed constitutional right he thinks he possesses but cannot articulate or defend in the light of day, the president simply signs the law as if he accepts its constitutional validity and then when no one but Vice-President Cheney is watching issues a signing statement saying he will comply with the law only to the extent he feels legally bound to do so, which of course, he doesn't.

This sort of presidential shenanigan would embarrass and anger the Founding Fathers. Embarrass them because the action is cowardly, which was hardly to be expected of the Chief Executive of the United States. It would anger them because it makes a mockery of the system of checks and balances they so carefully crafted.

In its report, the American Bar Association's blue-ribbon Task Force on Signing Statements concluded that the current practice represents "a real threat to our system of checks and balances and the rule of law." It is for this reason that I have introduced H.R. 264, the "Congressional Lawmaking Authority Protection Act. (CLAP Act)"

Mr. GOWDY. Before I recognize the gentleman——

Ms. JACKSON LEE. I thank the Chairman and I thank the witnesses. I yield back.

Mr. GOWDY. Before I recognize the gentleman from Idaho, for those of our panelists who may not be able to avail themselves of the history of this Committee from 2008 to 2010, the other side controlled this Committee, and not one single solitary piece of immigration reform was produced. Now, let's be fair. I have got colleagues like the gentleman from Illinois who are equally desirous of immigration reform no matter who the President is. But let's do not rewrite history. From 2008 to 2010, the Democrats controlled this Committee and nothing with respect to immigration reform. So do not talk to me now about what a huge priority it is.

I recognize the gentleman from Idaho.

Ms. JACKSON LEE. Will the gentleman yield?

Mr. LABRADOR. Mr. Chairman, thank you for the time. Panelists, thank you for being here.

Mr. LAZARUS. I have been listening to you for 2 and a half hours now, and I have not heard a single time where you have told me where in the law the Federal exchanges are given the authority to grant these subsidies. You talk about policy. You talk about what you think the President wants. You take about what you think the Democrats want. Tell me in the statute just one time where it says that the Federal exchanges are supposed to give this subsidy.

Mr. LAZARUS. Yes. I did not go into detail and I do not think that my friend, Mr. Cannon, did either.

Mr. LABRADOR. I think he did. He mentioned the numerous times where it gives this solely to the State exchanges.

Mr. LAZARUS. Let me answer the question.

First of all, I ask that the Committee include written testimony that I gave to a Subcommittee of Congressman Issa's oversight Committee that goes into detail about what the——

Mr. LABRADOR. Just name one. I just want one section of the law. I do not have that much time. Name one section of the law.

Mr. LAZARUS. And secondly, I also——

Mr. LABRADOR. You do not know.

Mr. LAZARUS. No, no. I did not say I do not know.

Mr. LABRADOR. You name one section of the law.

Mr. LAZARUS. I want to say that I had——

Mr. LABRADOR. One section of the law, Mr. Lazarus, where it says that.

Mr. LAZARUS. I would cite two sections.

Mr. LABRADOR. Okay, thank you. That is all I am asking.

Mr. LAZARUS. The first section is one that Congresswoman Lee referred to and that is where the law says that in the event that a State does not set up its own exchange, then the Secretary of Health and Human Services shall establish such exchange. Our interpretation and the Administration's interpretation is that the words "such exchange" should be interpreted to mean that the exchanges will operate on the same terms and have the same authority. Michael does not agree with that, but that is the interpretation.

Secondly—and I think this is really quite important—when the statute defines exchange with a capital E—it puts a capital E in

there—it says the exchange shall be an exchanged established by the State under the relevant section. And then——

Mr. LABRADOR. I reclaim my time. I just asked you a simple question.

Mr. LAZARUS. So the——

Mr. LABRADOR. Mr. Turley and Mr. Cannon, I think both of you, coming from different political points of view, had some of the same concerns that I had about the prior Administration, about the Bush administration. In fact, I read some of your writings, Mr. Turley, before I was a Member of Congress.

Mr. TURLEY. Bless you. [Laughter.]

Mr. LABRADOR. And I was very concerned about the imperial presidency. I was very concerned about having a Republican with Republicans in Congress who were not willing to be a check and a balance on a Republican President. And in fact, like Mr. Cannon stated in his testimony—I think it was you. I cannot remember which one of you it was who stated that maybe the one thing that you liked about Obama—you seem to agree with his policies. You seem to kind of like the fact that he was going to be a check on what previous Presidents had done.

So I am actually really disappointed that we are here at this hearing today, and I am surprised that my friends on the other side do not think that this is an important hearing because they seem to bitch and whine for 8 years about what the Bush administration did. And all of a sudden, they do not seem to have one single concern about what this President is doing with this authority.

What do you have to say about that, Mr. Turley?

Mr. TURLEY. Well, I believe that this institution is facing a critical crossroads in terms of its continued relevance in this process. What this body cannot become is a debating society where it can issue rules and laws that are either complied with or not complied with by the President. I think that is where we are.

And where Mr. Lazarus and I disagree, Mr. Lazarus keeps on saying, look, a President cannot ignore an express statement on policy grounds. I am not too sure what is involved here. If you look at the individual mandate, the policy issue there was that a great number of people were upset. They felt that there was a bait and switch. That is not the same thing that we see with like the environmental statutes that Mr. Lazarus points out. That is a political issue, a policy issue where the President said I do not want this to happen now and a lot of people are upset with it. That would seem to me if that is not a policy question, I do not what is. And by Mr. Lazarus' own definition, that would seem to be outside the authority of the President.

But in terms of the institutional issue that you are raising, look around you. Is this truly the body that existed when it was formed? Does it have the same gravitational pull and authority that was given to it by its Framers? You are the keepers of this authority. You took an oath to uphold it. And the Framers assumed that you would have the institutional wherewithal and, frankly, ambition to defend the turf that is the legislative branch.

Mr. LABRADOR. Mr. Cannon, it seems to me that Mr. Lazarus is arguing that the President can do anything that we refuse to act on. And I think that goes beyond what the constitutional powers

that were given to the President by our Founding Fathers. In fact, if you follow his logic, it seems to me that if he next decides that he wants to make sure that nobody who came here illegally, who came here just to work in agriculture, for example, can be deported because there would be some humanitarian concerns about deporting these people that he has the express authority to actually do that.

I am actually a proponent of immigration reform. I want immigration reform to be done. And I think the actions of the President have made it less likely that this body is going to act because we are not sure what he is going to enforce and what he is not going to enforce.

What are your comments on that?

Mr. CANNON. I think that there is no bright line, as far as I know, to be drawn between enforcement discretion and legislating. I think that the President's actions with regard to the Patient Protection and Affordable Care Act—wherever you draw that line, he is on the wrong side of it.

But I think the best way to curtail the abuse of prosecutorial discretion is to have fewer crimes. We have a lot of crimes in our immigration laws that I just do not think should be here. I think our drug war creates a lot of criminals, and there are a lot of crimes on our books as a result of the drug war that should not be there. And that is why prosecutors across this country are stretched so thin, why prisons are overcrowded. And when you have a situation like that where you have got a surplus of crimes and not enough resources to prosecute all of them, then you put a lot more power in the hands of individual prosecutors, as well as the executive branch generally, to decide how these laws are going to be enforced or not enforced. I think on a macro level that is how you try to attack this problem.

Mr. LABRADOR. Thank you.

I yield back my time.

Mr. GOWDY. The gentleman yields.

The Chair would now recognize the gentleman from Illinois, my friend, Mr. Gutierrez.

Mr. GUTIERREZ. Thank you very much, Mr. Chairman.

Well, once again we are not legislating in this Committee. We could be using this time to find common ground and even have a strenuous and substantive debate on important public policy matters, but instead I think what we are doing is offering empty assurances and shaping political messages for next fall. Rather than worrying about whether the President we know—and you “distrusts” is enforcing our laws the way you would like him to, we could be making meaningful progress toward crafting and passing laws for the betterment of the American people.

The President is not a Member of this Committee. He does not sit on this Committee. He does not have a vote in the House of Representatives. We should craft legislation and get it done. And then we should make sure that that legislation is enforced.

Now, I know that some people say, well, he is not enforcing the legislation. Let me just suggest to everybody when he got sworn in as President of the United States, Secure Communities was nothing in this country. There are hundreds and hundreds of agree-

ments with county, State, and local—how do you think the apparatus was created to deport 2 million people in the last 5 years? By accident? That apparatus did not exist under George Bush. It was created under his Administration and implemented by this President. And that is something that I am happy about, 287(g) agreements that have been made with one locality after another.

We are going to sit here and actually that Congresswoman Sinema, our colleague, who hired one of the DREAMers after she applied for DACA and successfully got her work permit and is now her district—her mom is under a current order of deportation. She quit her job today as a congressional aid to go and fight for her mom. And we are saying that he is not enforcing the law? I assure you that if you are fighting this Administration, as I and many others are fighting this Administration each and every day, you will find this President is, indeed, enforcing the law. Unfortunately, he should not be limiting his prosecutorial discretion. He should be expanding his prosecutorial discretion.

Now, on the substantive issue of DACA, the fact is we passed the DREAM Act in the House of Representatives in the fall of 2010, 216 to 208. But then we went to the Senate, Mr. Turley, and over there they said you need 60 votes now to get something done. We always talk about the Framers. I do not remember any Framers saying you need more than one vote in the majority in the Senate. But now you need 60. So they only got 55. So clearly the established will of the majority of the Senators and the House of Representatives was to do what? To protect the DREAMers. That is what the President did. He took the express will of the House and the Senate, if not for this new rule that they invented that they have had, I think, now for 35 years that you need the super majority of 60 votes. If we needed that here, even my colleagues on the Republican side would have a difficult time getting legislation passed.

So all I am trying to say is when we move the ball forward, the President looked at it. And I just want to say that I do not know about the other, but it seems like Bo Cooper, former INS General Counsel; Paul Virtue, former INS General Counsel—these are general counsels of the INS. Each of them established that the President of the United States does have prosecutorial discretion when he gets to decide who to prosecute and who not to. And that is what he did. He set children aside and said I am no longer going to prosecute them because they do not present an imminent threat.

And guess what, Mr. Chairman. A year and a half later, 500,000 of them are walking around, and I assure you because I know the way this place works if you can find one and bring them up here that shows how he has caused some danger or some harm, that person would have already have come. But the fact is that they are not. They are working in congressional—three of them are working in my congressional office filling out more. Look, they are American citizens in everything but a piece of paper.

And all I want to do—and I want to establish because the Chairman is absolutely correct. I am going to say this. When we were in charge in 2007 and 2008, we were worried about losing our majority because your side was beating the crap out of us. I am sorry. Maybe that word should not be used here. But that is what you

were doing. So if a Democrat voted for immigration reform, your side went boom, boom, boom, boom and knocked them out. Right? And then we were in the majority in 2009 and 2010, and we did nothing. I agree with you we did nothing.

But let's not repeat history. Let's not say you did not do anything, so we are not going to do anything. No. Let's do something.

I want to end with this. Here is what I would like to do. I want to step outside of my Democratic Party because I know there are men and women on your side of the aisle that want to step outside of their Republican Party and join an American party on the issue of immigration because I know there is common ground that we can reach. And then the President will not have to be taking these actions because more and more what you are going to find is people are going to say Congresswoman Sinema's staffer—we should not deport her mom. Mr. President, stop the deportation of that mom.

So all we are going to do is—look, they are here. There are 11 million of them. Let's figure out a way how we legalize their status, and let's figure out—if you want triggers, let's put the triggers in. But in the end, we are going to have to come back here, and when they become American citizens, they are all going to become American citizens. We should get over that because you know what is going to happen, Mr. Chairman? If we pass legislation and they all do not go to citizenship, the next day somebody is going to show up and say that Congressman Gutierrez did not do a good enough job. That is the positive thing. Somebody comes and says we did not do a good enough job.

Thank you. You have been so kind and so generous. I know one thing. Eventually we are going to have a hearing here. We are going to call you all back and you are going to let us know how we are going to get this done. I pray that that happens. It is the right thing for America. Thank you very much.

Mr. GOWDY. I thank the gentleman from Illinois.

The Chair will now recognize the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, the subject of today's meeting is pretty profound related to the rule of law, and there are so many examples that some of us point to, and it is hard to name them all. So I am just going to point to a few that this Administration seems to have stepped outside the boundaries of "the rule of law."

Taxing political contributions. Again, not in the law. Political speech disclosures for Federal contractors. The deep water drilling ban. Mr. Holder's attempt to reform criminal justice by selectively enforcing our laws. Mr. Obama's unilaterally ignoring immigration laws in many cases. Unconstitutional recess appointments. Fast and Furious, unconstitutional efforts there to walk guns. Unconstitutional wiretaps of the AP. The IRS scandal, one of the more egregious ones, as the gentleman mentioned that it subverts the entire political process. And of course, Obamacare, which I will touch on in a moment.

But all of these are examples where this President, in the words of my friends on the left, has exercised prosecutorial discretion—that is the word—presidential pardon powers. But I think they are more along the lines that Professor Turley said. These could be

considered royal prerogatives, which if my history is right, that is what we had that little unpleasantness with Great Britain about. So the subject here is of profound significance.

And I would suggest, Mr. Chairman, that not only in the application of the law has this Administration held themselves unconstrained by the Constitution or even the truth in many cases, but even in the process of getting the law.

On Obamacare, this was passed in a unique situation. You know, I see in Mr. Cannon's testimony especially—it is probably the perfect citation. I see in your testimony that you write, "President Obama's unfaithfulness to the PPACA is so wanton it is no longer accurate to say that the Patient Protection and Affordable Care Act is 'the law of the land.'" You know, it is kind of ironic because some of my colleagues, about 53 of us, have signed on to the House resolution stating that we believe that Obamacare has yet to be the law of the land because it violated the Origination Clause of the U.S. Constitution when it was passed. And we do not talk about that a great deal, but it is significant because the Origination Clause, which was vital to the Constitution ever coming in to existence in the first place—it was the critical negotiation that took place to allow the Constitution to exist—requires that all bills for raising revenue originate in the House.

And incidentally, Mr. Cannon, your colleague Ilya Shapiro at Cato has written an excellent piece laying out this argument, and I am going to ask that this be placed in the record here in a moment and also would like to ask you to address it if you have a perspective of it.

But the bottom line that is at issue here is that if the U.S. Senate can take a totally unrelated piece of legislation and strike everything but the number and take legislation that they called the Senate health care bill and place it in its entirety, which raises taxes to an enormous degree—if they can take any bill in the House and do that, then I would suggest to you, especially after the Supreme Court has labeled Obamacare a tax—they have officially called it a tax. And if indeed it can be done this way, then I would suggest to you that the Origination Clause is a dead letter. There is no more purpose for it being in the Constitution. And it is something that I hope that we will look at more carefully.

So if it is all right, Mr. Cannon, I am going to address my question to you. Do you have anything that would help illuminate this in ways that the rest of us can understand?

Mr. CANNON. Well, this is a provision of the Constitution that has not really been used or employed by the Supreme Court to knock down any revenue measures that were alleged to have originated in the Senate instead of in the House as required by the Constitution.

I think that what happened with the PPACA is a more extreme example of the abuse of—or a more extreme violation of the Origination Clause than what we have seen in the past. As you say, a bill came up with a totally unrelated revenue measure, came over from the House. The Senate stripped out everything within that bill, kept only the bill number, H.R. 3590, I believe, and inserted into that the Patient Protection and Affordable Care Act, which had all sorts of revenue measures, including the individual man-



date, which we did not know then was a tax, but now we know it is a tax until the Administration changes its mind again, which it continues to do.

There is nothing in the bill number that is a revenue measure. All the revenue measures had been stripped out of that bill. So if the Origination Clause means anything, then it means that that revenue measure that the Senate passed and then the House passed and that we now call the Patient Protection and Affordable Care Act originated in the Senate and the Senate did not have the power to originate a bill—a revenue measure like that.

But the difficulty is will the courts enforce that part of the Constitution. There is a difficult line to be drawn between when are you amending a revenue measure that came from the House and when are you originating a new bill. I think that reasonable people can disagree about where that line will be drawn. I do not think that reasonable people can disagree about whether the Senate's gutting of H.R. 3590 and inserting into that a totally new revenue measure—I do not think anyone can disagree that that is on the wrong side of that line. It remains to be seen whether the courts will uphold that part of the Constitution. If they do, then probably they would have to strike down the entire PPACA.

Fortunately, there is a lawsuit that is making its way through Federal courts—it has been filed by the Pacific Legal Foundation—that challenges the individual mandate under the Origination Clause.

Mr. FRANKS. Mr. Chairman, thank you. I guess if this Administration does not succeed in stacking the D.C. Circuit, we should find out whether the Origination Clause still means anything at all with the case that the gentleman mentions.

Mr. GOWDY. I thank the gentleman from Arizona.

The Chair would now recognize the gentleman from North Carolina, the former U.S. Attorney, Mr. Holding.

Mr. HOLDING. Thank you, Mr. Chairman.

Professor Turley, throughout your testimony, you have alluded several times that there are incidents that you believe that the President has stepped over the line, and we have talked about a number of them. But I would just ask for you to recap and maybe give us your top five instances where you think that he has overstepped the line and breached the Constitution.

Mr. TURLEY. Thank you very much, Congressman.

First of all, I do think that there is a number of provisions in the ACA where he did overstep the line. The decision on individual mandates strikes me as a rather obvious policy determination from the President that he did not want to see it enforced, given the amount of public opposition that occurred and accusations of a bait and switch. Those are all political issues. This was not Clean Air Act regulation that was stuck in the mire of regulatory disagreements as to a command and control statute.

I also believe that the employer mandate, which was also extended, constitutes a significant change in the legislation.

I also believe that the immigration issue is well across the line. I actually agree with the President on the decision that was made, but that does not matter because it was not made in a way that is allowed under our Constitution.

One of the things that I would point your attention to, Congressman Holding, is that if you look at each of these questions, a couple of things jump out at you. One is they happen to occur in areas of tremendous political division, if not deadlock. That is precisely the type of issue that the Framers wanted to go through the legislative process because our process, unlike other systems that would explode into the streets of Paris and other cities, we have a type of constitutional implosion. We direct those pressures to the center of Congress, and from that, we take disparate factional interests and turn them into a majoritarian compromise.

Mr. HOLDING. If I could get you to keep going down the list of instances where you think that he has overstepped.

Mr. TURLEY. The other two that really come out to me is really the issue of the \$454 million in the prevention fund issue for the Federal health care insurance exchange and also the \$700 billion for the State exchanges and then finally essentially the subsidies for congressional employees, which is less significant than those other ones. And what bothers me about those last examples is that it goes directly to the power of the purse. And we have seen over and over again courts saying do not worry, you have the power of the purse. And this Administration is now directly challenging that and saying we can take money that was dedicated for one purpose and give it to an unspecified disallowed purpose, and that challenges the very rock foundation of the Congress.

Mr. HOLDING. Mr. Rosenkranz, do you want to add any to this list of—I have got four.

Mr. ROSENKRANZ. Well, I agree with all the items on that list.

You know, a recent D.C. Circuit opinion spoke of the Nuclear Regulatory Commission refusing to make a decision about Yucca Mountain. That is quite a striking example. That is the example where Judge Kavanaugh—the Judge Kavanaugh quote came from.

And the other example that I really want to keep returning to is the IRS-targeted enforcement. So to my mind, taking care that the laws be faithfully executed—the core of that requirement is nondiscriminatory enforcement.

Mr. HOLDING. Mr. Lazarus, do you want to add any to this? Perhaps not.

Mr. Cannon, would you like to add any to this?

Mr. LAZARUS. I would like to ask isn't the Nuclear Regulatory Commission—

Mr. HOLDING. I am going to reclaim my time, Mr. Lazarus.

Before I go to you, Mr. Cannon, I want to use my last minute with Mr. Rosenkranz. Mr. Rosenkranz, you said that in extreme instances, impeachment would be appropriate to address one of these transgressions. We used the example of declaring war without congressional authorization. Say, on a scale of 1 to 10, that being a 10 as necessitating impeachment proceedings, we have reeled off six instances where the President has exceeded his constitutional authority. I would add a seventh in there with what he is doing with our drug laws and the mandatory minimums and the insistence that our prosecutors not charge all of the relevant facts.

Out of any of these seven, which ones rise to being the most egregious and would any of them trigger what you would think impeachment to be appropriate?

Mr. ROSENKRANZ. Well, I would not want to opine on quite what the impeachment line ought to be, but I think this body should think about a pattern, if they see a pattern and particularly if they see willful conduct. That is really the most egregious thing a President can do is willfully violate the Take Care Clause or display a pattern of disregard for a constitutional prohibition. So that is what I think the Committee should keep their eye on.

Mr. HOLDING. Mr. Chairman, I yield back.

Mr. GOWDY. I thank the gentleman from North Carolina.

The Chair would now recognize the gentleman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

I have sat here and I have listened and I have listened in the back. I listened to both sides. The thing that just disturbs me more about this hearing probably—Congressman King said it was one of the most interesting hearings that we have done and one of the relevant hearings. I am not going to disagree with that.

But I think for me it actually brings out one of the most disturbing hearings that we are having to have. And I think it is a progression issue here. And I am not going to be Republican or Democrat. It has happened more in the last 15 to 20 years. I think this is a progression of executives that both Republicans and Democrats have used really in some ways, pushed that boundary, stretched that boundary, and I think in the case of this, the President now has outright stepped over those boundaries.

And we can have legal discussions up here all the time. But the problem is from where I come from up in northeast Georgia people do not get it. They look at a government. They look at an executive. They look at what is going on right now, and they just basically say this is not the way it is supposed to work. You can go back to schoolhouse rock. You can go to civics class. You can do whatever, and you can be graduated law professors. But at the same point, if you cannot communicate it to the people who have to live under the situation, then there are mass problems. And I believe there is a right to have a mass problem right now.

We have talked about the power of the purse. I have talked all session ever since I got up here about I believe truly that this institution has got to matter again. It is Article I. We have talked about Article III a lot. We talked about Article II a lot, but it is Article I. Congress has to matter again, and that means that we have to take seriously our role of budgeting. We have to take seriously our role of legislating, but also holding accountable when we are being bypassed. And that is a concern.

And we talked about using the power of the purse. I think that has been an issue that has been well trodden today. We have talked about elections, and I think that is an issue that has been discussed.

But the other issue for me that is bothersome and you try to explain is what can you do. I am often asked this. You got to go up there and you just impeach him. Or you go up there. You just impeach the President. Or you go up there and you just cut funds off. You shut everything down. And it just becomes a blur.

And now we have Mr. Lazarus—and I respect your right to a differing opinion than mine on most things here—to say that I believe

he has stepped over and you believe he has not. That is where we differ.

And, Mr. Turley, we will agree on some things and probably not agree on others. But you made a statement that said, agree or not, it was not in the bounds of the Constitution. And I think that is interesting for us to talk about for just a moment because it comes back to what do we do besides getting our "act together," if you would, as Congress. What can we do? Because standing is an issue that we are having.

So I want to ask you just this question. Where do we go to begin that process of reclaiming our Article I, our constitutional role so that it is a three-legged stool and not right now a one and a half.

Mr. TURLEY. Well, it is an excellent question. Despite my deepest concerns, I remain optimistic. I am a Cubs and Bears fan. So I have spent most of my life with unrequited desires.

But it is as serious as you suggest, and there is a good reason why people cannot understand what is going on because we are acting outside the system. We have essentially taken the Madisonian system offline, and we are in this ad hoc improvisational world of constitutional law that is very, very dangerous.

Where I disagree with my friend, Mr. Rosenkranz, is I am always leery about people who say the solution is elections. The Framers did not intend for elections to be the solutions to constitutional problems. They created a system of checks and balances to allow the system to correct itself because there are plenty of abuses. You can have majoritarian terror that would be just promulgated and continued through elections.

Also, impeachment is not a good device for regulation. It is a very difficult thing. I testified at the Clinton impeachment hearings. It is a very difficult standard and is certainly not there as a substitute.

I think that a hearing that this body should seriously consider is to have a hearing on Member standing. I have been writing about this for years. I have represented Members. If we had Member standing, if Members could go to court and raise unconstitutional acts, much of these problems would go away because we have been guaranteed review. Much of what we have seen from the White House in my view is based on the assumption, not necessarily a bad one, that nobody will be able to call them to account.

Mr. COLLINS. I believe you are right on that.

You know, you said were an optimist. I am too if you have watched some of our sport teams lately in Atlanta. But I am an optimistic realist, and I do not get on the plane to come to Washington, D.C. I still look at this capital and I still believe it matters. I still believe that we are a shining light for the world. But I want to spend all of my time, as best I can, to bring us back to a balanced checks and balance system in which Congress' Article I authority is respected and honored and we also have the system that most people in this country grew up understanding. And I think that is what this hearing ultimately is about, is the respect of the people who sent us here, and we have got to continue that.

Mr. Chairman, I yield back.

Mr. GOWDY. I thank the gentleman from Georgia.

The Chair would now recognize the gentleman from Florida, Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Lazarus, if Congress passes a statute that applies to whatever parameters you want, can the President enlarge the parameters of the statutory text and apply it to areas outside that the statute contemplated?

Mr. LAZARUS. No.

Mr. DESANTIS. Okay, because it is interesting because in your—

Mr. LAZARUS. Let me just qualify that. This is an abstract question and it really depends on how the statute is worded.

Mr. DESANTIS. I understand that and I will give you a chance to respond because you cite bureaucrats within the Administration to justify some of the President's conduct, but you actually do not cite any quotes from the President himself justifying his conduct. And I think it was interesting with this most, quote, legislative fix for grandfathered plans, here is what the President said. Already people who predate the ACA can keep those plans if they haven't changed. That was already in the law. That is what is called a grandfather clause that was included in the law. Today we are going to extend that principle both to people whose plans have changed since the law took effect and to people who bought plans since the law took effect. In other words, Obamacare has a grandfather clause. Anything after the enactment of Obamacare is illegal unless it meets the statutory requirements. So what the President is saying is he is extending a grandfather clause to cover plans beyond what the statute contemplates. So you think that that is appropriate.

Mr. LAZARUS. I think you are making a good point. I think that it is appropriate if it is temporary.

Mr. DESANTIS. And, oh, by the way, let me just say. We passed in the House a bill that would have grandfathered in the plans, and I think that we should do that.

Mr. LAZARUS. What I meant to say was I think it is appropriate as a temporary measure if it is necessary to—

Mr. DESANTIS. It is directly contrary to the statute. The whole point of Obamacare was that you needed to force people into these exchanges.

What about this idea? If a political environment is tough, would that be a reason to delay a law or grant a waiver to a law if you cite the political environment as your justification?

Mr. LAZARUS. I think that would be—

Mr. DESANTIS. Congress is not doing what I want. I may suffer political damage. So I am going to do it anyway.

Mr. LAZARUS. Clearly that would not be appropriate.

Mr. DESANTIS. Well, because I think in your testimony—and you did make some good points. I will give you that. You did not cite the President's stated justification for delaying the employer mandate. He was asked about it at a press conference. He said, you know, in a normal political environment, I would pick up the phone, call the Speaker, say, hey, this is a tweak that does not go to the essence of the law, and we would delay it for a year. But

there is not a normal political environment when it comes to “Obamacare” is what he said.

Now, to me, I think that that is totally outlandish of an explanation. It is even more outlandish because Congress, by the time he made that statement, had already passed a bill to delay the employer mandate precisely for the reason that the President suggested.

Let me ask you one more question. Professor Turley, I really appreciate your written testimony, and you cite a lot of examples of the Founding Fathers.

And, Mr. Lazarus, you made the point that, hey, the Take Care Clause does not mean what the rest of these guys say. Original understanding—the Founders understood it. But you did not cite any actual Founding Fathers. So can you cite for me a Federalist Paper? Hamilton wrote a number on executive power. Can you cite a Constitutional Convention debate, a ratifying convention debate, early practice in the republic that would substantiate your assertion that that is consistent with the original understanding?

Mr. LAZARUS. Yes.

Mr. DESANTIS. Jefferson?

Mr. LAZARUS. There is very——

Mr. DESANTIS. Madison?

Mr. LAZARUS. No. There is very little discussion——

Mr. DESANTIS. Hamilton?

Mr. LAZARUS. There is very little discussion, but what there is——

Mr. DESANTIS. All right. So you are making an assertion that is not justified by the historical facts. I understand the theory that you are positing, but I think it is tough. You got to back it up. And I think Professor Turley backed up what he was trying to say. And so I am asking you who would you point to.

Mr. LAZARUS. Can I finish?

Mr. DESANTIS. Well, I want you to answer the question.

Mr. LAZARUS. The answer to the question is that during the Constitutional Convention—this is what I said in my testimony and this is what the basis of the interpretation is, and I think it is widely accepted. Originally what became the Take Care Clause did not have “faithfully” and did not have “take care” in it. It just said that the President shall carry into execution the laws. As the debate went forward, that got changed and “faithfully” and “take care” were added.

Mr. DESANTIS. I understand that.

Mr. LAZARUS. What I said what that clearly shows—and I think what scholars on all sides have accepted—that shows that the President is to faithfully, in good faith——

Mr. DESANTIS. Let me reclaim my time because you have made that point. That was not my question. My question is about show me something I can go where Hamilton is saying this or not. You are talking about——

Mr. LAZARUS. This is even more powerful. It does——

Mr. DESANTIS. And I think Mr. Turley’s point about the language is more correct.

But let me just say one other thing.

Mr. LAZARUS. This is the actual legislative record, and it is more—

Mr. DESANTIS. So the text matters there but it does not matter with the ACA because you are saying the purpose is different from what the text actually says.

But I do think, though, the idea of when you are talking about Mr. Cannon's argument, about, oh, nobody in Congress—they did not intend for this subsidy to do—the idea that we know what Congress intended on a 2,600-page bill that many Members did not read, much less understand—there were Members here swearing you could keep your plan, you could keep your doctor. And now we have Members of Congress running around saying, oh, my gosh, I did not know you would not be able to keep your plan, your doc. So the idea you are going to rely on that over the text of the actual statute to me I do not think—I am a textualist—I would do that anyway. But with this health care law I think of any law, surely you cannot point to what Congress intended and to these intricate provisions because many of them did not read or understand it.

And my time is up and I will yield back.

Mr. LAZARUS. But it is Mr. Cannon who is claiming that it was the intention. It was intentional and purposeful of Congress to construe the law in the cramped way in which he does.

Mr. GOWDY. I thank the gentleman from Florida.

The Chair would now recognize the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I thank all of our witnesses. It is good to see some of you back. I do not remember seeing all of you. Otherwise, it would be all of you.

If you would suppose with me that you are in a town hall back in a congressional district and you had an elementary school child, student, stand up and ask this question, I would like to know how each of you would answer this child's question. What right does the House of Representatives have to pick and choose what part of Government gets funding? What is your response? We will start with Professor Turley.

Mr. TURLEY. I am sorry. The last part of the question?

Mr. GOHMERT. What right does the House of Representatives have to pick and choose what part of Government gets funded?

Mr. TURLEY. Well, I think the answer is clear. In this sort of orbital world, these three branches are placed by the Framers. The key power given to Congress and the House of Representatives was the power of the purse, to control the funds. What is alarming about the situation is that even that power is being challenged and being marginalized.

Mr. GOHMERT. Professor Rosenkranz?

Mr. ROSENKRANZ. Article I, section 8 gives you the power to decide what you want to fund and what you do not want to fund.

Mr. GOHMERT. And, Professor Lazarus?

Mr. LAZARUS. Professor Rosenkranz took the words right out of my mouth.

Mr. GOHMERT. Article I, section 8? Okay.

Mr. CANNON. Article I, section 8, along with the Senate.

Mr. GOHMERT. Mr. Chairman, I would ask that we provide a copy of the answer to this question to Senate Leader Reid since he asked that question.

Now, with regard to Libya, the President said he did not need to come to Congress in order to get our authority to start bombing in Libya. And that was a concern to some of us. He had been asked by the Organization of the Islamic Conference, all 50 or 57 states, whatever they got, 50, 57, and also by some of the NATO allies that use Libyan oil. So he did not need Congress' approval because he had those requests.

He was initially prepared to help the Syrian rebels, which al Qaeda had become, not initially, but they have become the most profound part, and he was ready to start bombing the Syrian leader that Hillary Clinton had called a reformer. Initially he planned to do that without Congress' consent. He did not think he needed Congress' consent, but obviously once there was a lot of political pushback, he threw it to Congress and let them decide.

But I am curious from each of you. What gives the President the authority to order bombing, even if he promises to limit the numbers of people that he will kill? What gives him authority to go start bombing a country? Obviously we would consider it an act of war if any country started dropping bombs over us. But what gives him that authority? I am curious, from each of you.

Mr. TURLEY. Well, first of all, I think it is a great question because I was a little confused when Mr. Lazarus says no one has accused President Obama of being inclined to engage in war without a declaration. I was in court with Members of this Committee saying exactly that in the Libyan war conflict. And what disturbed us is that the White House came back and said the reason we do not need a declaration of war is because the President alone defines what a war is, and he is simply saying this is not a war.

And when we talk about the dangers, this is a danger of a different kind. It is not only a danger of separation of powers, obviously, and a direct violation of the express language of the Constitution, but this Administration through these acts and through the large number of drone attacks is returning the world to a state of nature. We are taking down critical international legal principles that have governed this world, that have respected territorial limitations.

I just spoke to the NATO parliamentarians, and I told them you will loathe the day that you endorsed the U.S. position that they can take unilateral action when somebody vaporizes someone in the middle of London.

Mr. GOHMERT. My time is about to run out. So let me morph that into this question to each of you and get your answer.

Now, the President had ordered Anwar al-Awlaki killed by a drone strike in Yemen, an American citizen, without any due process as we have come to know it. I asked the question in this room at another hearing, how far does that order extend? I mean, if al-Awlaki came back to Capitol Hill and led prayers, as he had before, of congressional staffers, was that order still good? I wanted to know in case a drone strike was still on.

What authority do you think the President has to order American citizens killed in other countries in which we are not at war



or in the U.S.? My time is up, but if I can get answers to that question from each of you.

Mr. GOWDY. As quickly as you can, given the subject matter.

Mr. TURLEY. I do not believe he has authority to do that. They have cited things like hot pursuit, which makes no sense. It is not an imminent threat. I believe the President's kill list policy is flagrantly and dangerously unconstitutional.

Mr. ROSENKRANZ. I think it is quite a difficult question, but the Obama administration's Office of Legal Counsel memo on this is certainly quite strained. So they are reaching for analogies and analysis that is quite unconvincing I would say.

Mr. GOHMERT. Professor Lazarus?

Mr. LAZARUS. I am very, very far from an expert on these matters. But I would just offer one observation and that is I do not really see why the American citizenship issue in the case that the Congressman is referring to is all that significant. I think that if a Nazi general happened to have been an American citizen, it would not alter the way we could deal with him militarily. But there are weighty questions about the President's authority to implement the drone program. I do not really have an expert view on that.

Mr. GOHMERT. Briefly, Mr. Cannon.

Mr. LAZARUS. I think it has been very effective militarily, so that is a good thing.

Mr. CANNON. I will just associate myself with Professor Turley's comments.

Mr. GOHMERT. Okay. Thank you very much. I appreciate you all's testimony.

Mr. GOWDY. I thank the gentleman from Texas.

The Chair would now recognize another gentleman from Texas, Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much, Mr. Chairman, and I appreciate the opportunity to ask some questions here.

I am going to ask for you all's help in answering what is probably the number one question I get at town hall meetings and people who are running up to me at the grocery store when I am back home in Texas. And it goes something like this. In light of—and you can insert whatever you want, Benghazi, Fast and Furious, the IRS targeting of advocacy groups, NSA overreach, if you like your health care, you can keep it, varying the terms and waivers of Obamacare. The number one question I get is what can you do about it. We sent you to Congress to do something about this.

And I have listened today, and I have heard we could enact new laws. Well, that does not work if they cannot get through the Senate and the President himself will not sign it. We can use the power of the purse. Well, that is pretty much dead. We have heard testimony about that. And in the era of continuing resolutions, we do not have a lot of options here. Well, we could go to the court. We have heard about the standing issue. Also even when there is standing, a delay tactic leaves you—probably the President will be termed out by the time any of these court decisions are held. We talked a little bit about elections. I think Chairman Issa brought up the issue with the IRS scandal interfering with elections, that is kind of off the table. And I will admit my party did not do as

well as we probably should have in the other election, but we did do well in the 2010 election when in historic numbers Congress changed. And then we have also talked about the “I” word, impeachment, which again I do not think would get past the Senate in the current climate.

Am I missing anything? Is there anything else we can do? Mr. Turley?

Mr. TURLEY. Well, it does paint a dire picture. As we have said before, for years I have encouraged Members to consider Member standing as a standalone issue, of trying to find a way to establish, either constitutionally or through statute, to allow Members of Congress to have——

Mr. FARENTHOLD. Okay. So there is one fix to the court system. But you are still not going to get that through in any amount of time.

Mr. TURLEY. Yes. To me the most troubling thing is—I just published a Law Review article on recess appointments, which I also testified on.

Mr. FARENTHOLD. We forgot that one in the list.

Mr. TURLEY. What is fascinating about it is that because Congress has been stripped of more and more of its power, it has actually put more emphasis on appointments as a way of controlling the White House.

Mr. FARENTHOLD. Have we been stripped of it or have we inadvertently given it up?

Mr. TURLEY. I am afraid it is either by acclaim or it has been——

Mr. FARENTHOLD. I have to ask the rest of the panel. Mr. Rosenkranz?

Mr. ROSENKRANZ. Well, I have said it before. I am sorry to say that the ultimate remedy for this sort of thing is elections, and democracy is slow and messy. But at the end of the day, the right answer for this Committee is to hold hearings like this, to publicize what it takes to be violations of the Constitution and for that to become an election issue.

Mr. FARENTHOLD. Mr. Lazarus, I realize you do not think we have the problem with the President a lot of my constituents have. But have I missed anything on a remedies against any rogue—again, I use the term in broad, general—not pointing to anybody in particular—a rogue President?

Mr. LAZARUS. I think that is, with all due respect, a gross misrepresentation of this President.

Mr. FARENTHOLD. I was not pointing to this President. A hypothetical rogue President.

Mr. LAZARUS. Well, we know. We had a rogue President who was driven from office and who would have been impeached and convicted had that not happened. Actually that result was guaranteed in this very room when the ranking Republican Member of the Judiciary Committee voted to impeach Nixon. So, sure——

Mr. FARENTHOLD. Mr. Cannon?

Mr. CANNON. Well, I think what Professors Turley and Rosenkranz said is accurate or would help Member standing. Yes, you have to win elections, but something that has not been mentioned is getting Democrats to care about this issue when there is

a Democratic President and getting Republicans to care about these issues when there is a Republican President.

Right now, I do not know if anyone who is watching this at home has noticed, but all the Democratic Members of the Committee have left room. I think they left about 20 minutes. We are 3 and a half hours into this hearing. They are obviously not as interested in this as—

Mr. FARENTHOLD. And finally, I think one of our problems here is we have a President right now who is not willing to work with Congress. We just had a Democrat walk in.

Mr. CANNON. I retract my statement. My apologies.

Mr. FARENTHOLD. I have talked to a constituent who worked for the Bush White House whose job it was to lobby with Congress, and I have met with somebody from the Obama administration exactly twice in 3 years. And I do think it is the President's duty to engage. I had a question on that, but I am out of time. But I do think there is a disappointment with the President not being engaged.

Mr. Cannon?

Mr. CANNON. If I may. Republicans are very concerned about executive power when the executive is a Democrat. Democrats are very concerned about executive power abuses when the executive is a Republican. I think the Members of each party need to care about these issues a lot more when someone from their own party occupies the White House and not just when someone from the opposite party—

Mr. FARENTHOLD. Thank you. I see my time has expired, Chairman Gowdy. I will give it back to you.

Mr. GOWDY. I thank the gentleman from Texas.

The Chair would now recognize the gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, sir.

I have obviously missed some of this hearing, although I have caught some of it on the magic of video television. And I was interested the gentleman, Mr. Cannon, had mentioned the possibility of impeachment or some impeachable offenses. Is that accurate?

Mr. CANNON. I cannot remember if I brought that up. I may have.

Mr. COHEN. And in what context would you have brought that up?

Mr. CANNON. I think in response to a question. I am not sure if I did or if someone else—

Mr. COHEN. Can anybody on the panel refresh his memory?

Mr. CANNON. I think what I brought up was a constitutional amendment convention. I do not think I brought up impeachment. I agree that it is certainly a tool that the Congress can use to restrain the executive.

Mr. COHEN. Constitutional amendment. You suggested we should have a convention?

Mr. CANNON. The question I was asked was—I was asked about ways the people can restrain the executive, and I offered that as one way.

Mr. COHEN. That has never been done before. Has it?

Mr. CANNON. Not that I am aware of, no.

Mr. COHEN. Anybody else on the panel have any thoughts about impeachment?

Mr. ROSENKRANZ. I mentioned impeachment earlier. We have been asked several times questions about possible remedies if we find that a President is behaving lawlessly. I have not said that this President has or that these examples rise to that level. But the ultimate constitutional check on a lawless President is impeachment and ultimately election.

Mr. COHEN. Right. That is the check. But nobody has suggested that the President has certainly not committed any impeachable offenses, I presume. Nobody here thinks that. Is that right? Mr. Cannon?

Mr. CANNON. Well, I do not know. As Professor Rosenkranz mentioned, I think an important element is that whatever crimes or misdemeanors he has committed were committed knowingly and whether there is a pattern of abuse of his office. And in my testimony, you will see that I actually lay out a pretty consistent pattern whereby President Obama has ignored and tried to rewrite portions of the Patient Protection and Affordable Care Act. And I think that the most egregious of these is the one where he is implementing the law in a way such that he is taxing and borrowing and spending, over the next 10 years, \$700 billion that this Congress never authorized.

Now, you may disagree with my interpretation of the law. I know Mr. Lazarus does. But I think that you and I and Mr. Lazarus would all agree that if a President were trying to tax and borrow and spend \$700 billion without congressional authorization, that might be an impeachable offense.

Mr. COHEN. Does anybody here think any actions of the Bush administration and going into Iraq without actual knowledge of weapons of mass destruction or anything else would have been an impeachable offense? Mr. Lazarus, you seem to be nodding.

Mr. LAZARUS. No. Disregard the nod behind the curtain or in front of the curtain. I was very upset by that, but whether it is impeachable is a political decision that Congress would have to make.

Mr. COHEN. Mr. Turley?

Mr. TURLEY. Well, the war powers issue does come closest for me for both President Obama and President Bush. The reason I do not think it rises to that level is because court decisions have made this so much of a mess, first of all, by judicial passivity in not reviewing it and by the use of historical practice. So I think it is very hard to maintain an impeachable offense when you have that degree of ambiguity. I do not believe that ambiguity is found in the Constitution. I believe that President Obama violated the Constitution in Libya, for example. But because of that history and precedent, they can claim that were acting on a reasonable interpretation of the law.

Mr. COHEN. Thank you.

Mr. Gowdy, I congratulate you, I guess, on South Carolina's victory, and I yield back the balance of my time.

Mr. GOWDY. Thank you, Mr. Cohen. I have got to be careful how I respond to that since they are both State schools. I thank the gentleman from Tennessee.

I would now recognize another gentleman from Texas, former judge, Judge Poe.

Mr. POE. I thank the Chairman.

I disagree with you, Mr. Cannon, on that Republicans are only concerned about executive abuses when Democrats are in control. I personally do not like any executive abuses no matter who the President is. And I think our executives have gotten out of control over the last several executives, not to mention the judicial branch which I served in for 22 years. I think it has exceeded its boundaries of the Constitution.

But we are talking about the executive branch. In the Constitution, if I remember correctly, the executive branch is mentioned second. The first one mentioned in the Constitution is the legislative branch. That would be Congress. Third is the judicial branch. My understanding of the writers of the Constitution—they put the most important one first and least important last because we are elected and the guys on the other end are appointed forever. In the middle is the executive branch.

The President said we are not a banana republic. There are a lot of definitions to banana republic, but my view of a banana republic is a lawless country. We are proud of the fact in the United States we are a country of laws not people. But yet, we are in a situation where the law means different things to different people and it is not enforced.

And like many have said here, back home in Texas they just do not understand where the President gets the authority to do some of these things without congressional intervention. I agree with the people that I represent, and they are from both parties. They are not just Republicans. They are saying, well, how can he do that? If I hear that once, I hear it a hundred times when I go home on weekends. How can he do that and what are you going to do about it, Congressman Poe? I get asked that a lot.

We have had some discussion about those things. We know subjects. There are a lot of subjects when people question where the President has authority. But let's spend one moment on one issue.

Obamacare, according to the Supreme Court, is a tax. The President has used the law and has said that I am going to postpone that tax for this group first, big business. Then I am going to postpone the tax for 6 weeks for individuals, and then I am going to postpone the tax a year for small businesses. He is postponing taxes. Since I have no life, I have read Obamacare. I do not see that in there where the President—we gave him the authority to postpone a tax, but he does it.

Now, if he has the legal authority to do that, which I doubt—but he used that authority—what is to prevent him from just going looking at the IRS Code, which is a mess. I do not know any American that thinks the IRS Code is a good bill, but rather than fix it, we just make it bigger every year. So the President goes to the IRS Code and says, well, this group of businesses—they are just having a bad year like green businesses, or we could use the energy companies on the other end, the oil and gas industry. I am just going to postpone them paying income tax for a year. Why? Because I said so. Or I will take this group and do something similar,

tweak their tax. Rather than paying 38 percent, they are going to just pay 20 percent for the next year.

It seems to me if he has the legal authority to amend taxes, which the Affordable Care Act is a tax according to the Supreme Court, what is to prevent him from just amending any tax to his liking? Mr. Turley, weigh in on this, if you would, Professor.

Mr. TURLEY. Thank you, Congressman.

I have to agree. First of all, on your first remark about Article I, as I have said before, it is true that they are all equal branches, but the Framers spent the most time on Congress because it is this thumping heart of the Madisonian system. It is where the magic happens, and that magic is to take those factional interests, those interests that destroyed countries, and turn them into a majoritarian compromise.

And when we get to the issue of taxes, as you have raised, that is one of the most divisive issues facing the country. And so when someone comes before Congress and says I want my group to be excluded, it obviously produces a great deal of heat from people saying, well, how about my group. How long should this apply? It is perhaps the most divisive issue that is raised in Congress, and that is precisely why it was given to Congress so that those types of issues would be subject to this transformative process of legislation.

Mr. POE. So do you believe that that would be an unlawful constitutional act if the President started amending the tax code on his whim?

Mr. TURLEY. Yes, I do.

Mr. POE. Let me ask you one other question, if I may, Mr. Chairman.

You mentioned remedies. What about the remedy of a mandamus? Would a mandamus remedy lie in any situation where Congress thought the executive had not enforced the law?

Mr. TURLEY. Mandamus can be very difficult in some of these if you are trying to use mandamus against the President, but you can challenge some of these decisions, for example, the HHS decisions as violating APA, for example. You can go with—if you have standing to do so. Those are obviously a long process.

And this is one of the things where I tend to get off the train with at least one of my colleagues. This is not an APA issue. This is a constitutional issue. It is a President usurping the authority of Congress. And to say that this is just something that we leave to agencies I think radically misunderstands the severity of the situation.

Mr. POE. Thank you, Mr. Chairman. I yield back.

Mr. GOODLATTE [presiding]. I want to thank all of our witnesses for an excellent hearing, a great discussion on what I think is one of the most important issues facing our country today.

I want to also thank the Members for a very strong participation in today's hearing, and that means the witnesses had to stay maybe a little longer than they had originally thought they would, but that only means that you have had the opportunity to talk through and think through and debate this issue even more extensively. So I thank all of you for your participation.

This concludes today's hearing.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And this hearing is adjourned.

[Whereupon, at 1:36 p.m., the Committee was adjourned.]





## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

**Supplemental Material submitted by Michael F. Cannon,  
Director of Health Policy Studies, Cato Institute**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

DAVID KING, et al.,

Plaintiffs,

v.

KATHLEEN SEBELIUS, et al.,

Defendants.

Case No. 3:13-cv-00630-JRS

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**BRIEF OF JONATHAN H. ADLER AND MICHAEL F. CANNON  
AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFFS**

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**INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

*Amici* were among the first to consider the federal government's authority to extend subsidies for coverage purchased through federally established marketplaces. They have since, separately and together, published numerous articles, delivered lectures and testimony, and advised government officials on that issue and, in particular, on the regulation challenged here. They are the authors of the leading scholarly treatment of this issue, Jonathan H. Adler and Michael F. Cannon, Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA, 23 Health Matrix J. L. Med. 1, 119 (2013).

Jonathan H. Adler is the Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law in Cleveland, Ohio. Professor Adler teaches courses in constitutional and administrative law, among other subjects, and is the author of numerous articles on federal regulatory policy and legal issues relating to health care reform, including Cooperation, Commandeering or Crowding Out? Federal Intervention and State Choices in Health Care Policy, 20 Kan. J. L. & Pub. Pol'y 199 (2011).

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<sup>1</sup> Counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.



**SUMMARY OF ARGUMENT**

The Patient Protection and Affordable Care Act of 2010 (“PPACA” or “Act”) provides “premium assistance tax credits” for the purchase of qualifying health insurance plans in health insurance Exchanges established by states under PPACA Section 1311, 42 U.S.C. § 18031. The Internal Revenue Service rule purporting to implement those premium-assistance tax credits is contrary to the plain language of the PPACA and cannot be justified on other grounds. The rule exceeds the agency’s authority and subverts congressional intent by subverting the balance Congress struck between the Act’s competing goals.

The PPACA mandates the creation of health insurance “exchanges” to regulate health insurance within each state; declares that “Each State shall . . . establish” an Exchange; directs the federal government to establish one in states that do not; and offers health insurance subsidies to certain qualified taxpayers who enroll in a qualified health plan “through an Exchange established by the State under Section 1311.” This language originated in the Senate Finance Committee, was clarified and strengthened thereafter in the Senate, and was approved by both chambers of Congress and the President. The legislative history of the PPACA is fully consistent with the plain text of these provisions.

The authors of the PPACA conditioned premium-assistance tax credits on states establishing Exchanges to induce state cooperation. Specifically, to avoid “commandeering” the states, the PPACA’s authors offered premium-assistance tax credits as one among a number of financial inducements for states to perform this task for the federal government. Congress routinely conditions federal benefits to individuals—both via direct spending and the tax code—on their states’ carrying out congressional priorities. Indeed, conditioning premium-assistance

tax credits on states' establishing Exchanges (and enacting other health insurance measures) is far from the largest financial inducement that Congress created for states in the PPACA.

Contrary to the clear language and purpose of the statute, and without any reasoned basis, the IRS rule attempts to dispense premium-assistance tax credits in the 34 states that have opted not to establish an Exchange. Under the PPACA, those tax credits directly trigger penalties against employers and indirectly (but no less clearly) trigger penalties against individual taxpayers. The IRS rule therefore has the effect of triggering spending and imposing financial penalties that Congress never authorized. On that basis, the Plaintiffs' challenge to that rule should be sustained.

#### **ARGUMENT**

##### **I. The PPACA Authorizes Premium-Assistance Tax Credits Only in States that Establish Their Own Exchanges**

The premium-assistance tax credit provisions of the Patient Protection and Affordable Care Act of 2010 clearly, consistently, and unambiguously authorize tax credits only in states that establish a health insurance "exchange" that complies with federal law.

##### **A. The Text's Meaning Is Plain**

As written, the PPACA only provides for the issuance of tax credits for the purchase of qualifying health insurance plans in Exchanges established by states under PPACA Section 1311. The tax credits for the purchase of qualifying health insurance plans are provided for under PPACA Section 1401, which creates a new section of the Internal Revenue Code—Section 36B. 26 U.S.C. § 36B. This provision authorizes tax credits for each month in a given year in which a taxpayer has obtained qualifying health insurance through a state-run Exchange. As defined by Section 1401, a "coverage month" is any month in which the taxpayer is "covered by a qualified health plan . . . that was enrolled in through an Exchange established by the State under section

1311.” 26 U.S.C. § 36B(c)(2). The amount of the tax credit is also calculated with reference to either a qualifying health insurance plan “enrolled in through an Exchange established by the State under [Section] 1311 of the Patient Protection and Affordable Care Act” or the “second lowest cost silver plan . . . offered through the same Exchange.” 26 U.S.C. §§ 36B(b)(2)(A), 36B(b)(3)(B). Indeed, every explicit or implicit reference or cross-reference to an Exchange in the tax-credit eligibility rules of Section 36B is to an Exchange “established by the State under Section 1311.” 26 U.S.C. §§ 36B(b)(2)(A), 36B(b)(3)(B)(i), 36B(b)(3)(C), 36B(c)(2).

Section 1311 further establishes the “requirement” that for purposes of that Section an “Exchange” be “a government agency or nonprofit entity that is established by a State.” 42 U.S.C. § 18031(d)(1). To further erase any doubt, PPACA Section 1304 also defines “State” as “each of the 50 states and the District of Columbia.” 42 U.S.C. § 18024(d). *Accord* 45 C.F.R. 155.20 (defining “State” as “each of the 50 States and the District of Columbia”). The cost-sharing subsidies provided under Section 1402 are similarly limited, as that provision expressly provides that cost-sharing reductions are only allowed for “coverage months” for which the aforementioned tax credits are allowed. 42 U.S.C. § 18071(f)(2).

Section 1311 makes no reference to federally facilitated Exchanges. Authority to create such Exchanges comes from a separate provision, Section 1321, 42 U.S.C. § 18041. Specifically, if the State has not established its own Exchange under Section 1311; or if the State fails to have “any required Exchange operational by January 1, 2014”; or if the State “has not taken the actions the Secretary [of Health and Human Services] determines necessary to implement” the “regulations setting standards for meeting the requirements under [Title I] with respect to the establishment and operation of Exchanges (including SHOP Exchanges)[.] the offering of qualified health plans through such Exchanges; the establishment of the reinsurance and risk

adjustment programs under part V[,] and such other requirements as the Secretary determines appropriate”; or if the State “has not taken the actions the Secretary determines necessary to implement . . . the requirements set forth in subtitles A and C” of Title I; then Section 1321(c) requires “the Secretary shall . . . establish and operate such Exchange within the State . . . .” PPACA § 1321.

Portions of the PPACA may not be models of clear legislative drafting, but the provisions authorizing tax credits for the purchase of qualified health insurance plans are abundantly clear. Tax credits are only authorized for qualifying coverage, and such coverage must be obtained through an Exchange “established by the State under section 1311.” This language identifies two conditions for the issuance of tax credits—that the Exchange is established “by the State” and that it is established “under section 1311”—each of which requires purchase of the qualifying health coverage in a state-established Exchange. The remainder of the statute supports the plain language of the tax credit provisions. *See* Jonathan Adler & Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 *Health Matrix J. L. Med.* 1, 119 (2013) (“Adler & Cannon”).

**B. There Is Widespread Agreement that the Text’s Meaning Is Plain**

Notably, there is little disagreement within the legal and policy communities on the plain meaning of these provisions. The non-partisan Congressional Research Service, for example, acknowledges that the tax-credit eligibility provisions are clear. Cong. Res. Serv., *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act* (Jul. 23, 2012) (“a strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS’s authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established

exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chevron* deference, and likely be deemed invalid”). Even defenders of the IRS rule have acknowledged the statute’s eligibility rules “clearly say” that tax credits are authorized only for those who buy health insurance through state-established Exchanges. *See, e.g.,* Timothy Jost, *Yes, the Federal Exchanges Can Offer Premium Tax Credits* (Sep. 11, 2011), <http://www.healthreformwatch.com/2011/09/11/yes-the-federal-exchange-can-offer-premium-tax-credits/>.

Indeed, in its own regulations HHS has recognized that an Exchange established by the Secretary under Section 1321 of the Act is *neither* an Exchange “established by the State” nor is it “established . . . under Section 1311.” *See* 45 C.F.R. 155.20 (defining a “federally facilitated Exchange” as meaning “an Exchange established and operated *within* a State by *the Secretary* under *section 1321(c)(1)* of the Affordable Care Act”) (emphases added). Thus did Congress condition the availability of premium-assistance tax credits on states taking each of the actions specified in Section 1321, including but not limited to the establishing of Exchanges.

When the IRS promulgated the regulation purporting to authorize the issuance of tax credits and cost-sharing subsidies for the purchase of qualified health insurance plans in federal Exchanges, it did not identify any statutory language to justify its interpretation. There is a simple explanation for this: there is no supporting language. In the absence of such language, the IRS lacks the authority to extend tax credits where Congress has failed to do so. As the Supreme Court has been repeatedly forced to explain, “[i]t is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

**C. The PPACA Precludes IRS's Deviation from the Plain Meaning of the Text**

After IRS promulgated its final rule, some federal officials attempted to offer *post hoc* rationales for its deviation from the statutory text. *Amici* here address the two most prominent, in turn.

*1. The Purported Equivalence Between State and Federal Exchanges*

A common rationale is that a federal Exchange stands in the shoes of a state one and so should be treated in the same manner. But the language in Section 1321 requiring the Secretary to establish and operate “such exchange within the State” does not establish an equivalence between state and federally facilitated Exchanges. A federal Exchange created under Section 1321 is subject to the same regulatory requirements as a state Exchange created under Section 1311, but the two remain distinct. As noted above, Section 1311 expressly requires that an authorized Exchange must be “established by a State,” 42 U.S.C. § 18031(d)(1), and Section 1304(d) also expressly defines “State” as “each of the 50 States and the District of Columbia.” 42 U.S.C. § 18024(d). Section 1321 also recognizes that federal Exchanges are distinct. It provides, “the Secretary shall . . . establish and operate such Exchange within the State *and the Secretary shall take such actions as are necessary to implement such other requirements,*” a reference to the requirements of Title I of the PPACA, which include those limiting tax-credit eligibility to states that establish Exchanges. PPACA § 1321 (emphasis added). Later amendments to the PPACA provide that Exchanges created by territories are to be treated as the equivalent of state-run Exchanges, but there is no such language concerning federally run Exchanges. 42 U.S.C. § 18043(a). *See also* 26 U.S.C. § 36B(f)(3) (mentioning Section 1311 and Section 1321 Exchanges separately). If the language of Section 1321 made federal Exchanges the equivalent of Section 1311 Exchanges, there would have been no reason to adopt this

additional language in the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1004, 124 Stat. 1029, 1035 (2010) (“HCERA”).

Even assuming *arguendo* that a Section 1321 Exchange is the equivalent (or “stands in the shoes”) of a Section 1311 Exchange, that still does not justify the extension of tax credits in federal Exchanges. This is because, as noted above, when Section 1401 defines the coverage for which tax credits may be provided, it identifies two relevant conditions: (1) that the insurance is purchased in a Section 1311 Exchange, and (2) that the insurance is purchased in an Exchange “established by the State.” So even if one were to read the reference to an Exchange “established . . . under Section 1311” as incorporating those established by the federal government under Section 1321, this would not make such an Exchange one “established by the State” as expressly and repeatedly required by Section 1401.

## 2. *Reporting Requirements*

Federal officials have argued, as well, that Congress indicated its intention to provide tax credits in federal Exchanges by imposing reporting requirements on both state and federal Exchanges that include a requirement to report information related to tax credit payment and eligibility. This argument also fails, for at least four reasons.

First is the statutory text. The information reporting provisions make express reference to both Section 1311 and Section 1321 Exchanges. 26 U.S.C. § 36B(f)(3). The fact that the authors of the HCERA felt the need to expressly identify both Section 1311 and Section 1321 Exchanges shows that the two are not equivalent. If the “such exchange” language noted above were sufficient to make a Section 1321 Exchange equivalent to a Section 1311 Exchange in all respects, it would have been unnecessary to mention both.

Second, the relevant HCERA provisions require substantial reporting of information that will be of use to federal authorities even apart from the provision of tax credits, including the level of coverage obtained and premiums charged. Insofar as the PPACA is designed to encourage states to create their own Exchanges, the collection of information in federal Exchanges indicating the level of tax credits or subsidies for which individuals would be eligible under a state Exchange would be useful. Such reporting certainly does not suggest that Congress intended to neutralize the powerful incentive to states to establish their own Exchanges—quite the opposite, it lets the states know that they are leaving money on the table and should get with the program.

Third, even were this not the case, providing a single list of reporting requirements for all Exchanges is easier and more efficient than trying to separately delineate what information must be reported by what sort of Exchange. Such a provision does not even speak to any equivalence between state and federal Exchanges in other respects, such as the availability of subsidies.

Fourth, Congress applied these reporting requirements to “[e]ach Exchange,” encompassing both American Health Benefits Exchanges, where the relevant tax credits are available, and Small Business Health Options Program or “SHOP” Exchanges, in which the relevant tax credits are not available. 26 U.S.C. § 36B(f)(3); 42 U.S.C. § 18031(b). The adoption of these reporting requirements therefore cannot establish that tax credits and cost-sharing subsidies are available in *all Exchanges* subject to these requirements.

\* \* \*

In sum, the plain text of the PPACA clearly provides that premium-assistance tax credits are only available for the purchase of qualified health insurance plans in state-established



Exchanges. This text is unambiguous and fully consistent with all of the relevant statutory provisions.

**II. The Legislative History of the PPACA Supports the Plain Meaning of the Statutory Text**

Nothing in the statute or legislative history should lead the Court to doubt the plain meaning of the statutory text. To the contrary, all of the relevant provisions of the PPACA and the statute's legislative history are fully consistent with the plain meaning of Section 36B. *See generally* Adler & Cannon, *supra*, at 142-65. When promulgating this regulation, the IRS failed to cite any legislative history in support of its interpretation. There is none.

**A. The Legislative History Demonstrates That, Consistent with the Statutory Text's Plain Meaning, Congress Intended Subsidies To Induce the States To Establish Exchanges**

Supporters of comprehensive health reform had begun to coalesce around broad reform principles by late 2008, though disagreements about key elements, such as the role states could or should play in any reforms, remained. These disagreements would continue throughout the development of the various legislative proposals, including the Senate bill that would eventually become the PPACA. The legislation that eventually passed reflects numerous compromises and an ultimate decision that enacting a bill that many supporters considered to be flawed was better than not passing any bill at all.

Senate Finance Committee Chairman Max Baucus (D-MT) was one of the primary authors of the bill containing the Exchange and premium-assistance tax-credit provisions that would become law under the PPACA. *See* Kate Pickert, Max Baucus, Obamacare Architect, Slams Healthcare.gov Rollout, TIME.com (November 6, 2013) (describing Baucus as "a key architect of the law" and quoting Baucus, "I spent two years of my life working on the Affordable Care Act"). In November 2008, Baucus released a "white paper" that, among other

things, proposed a health-insurance tax credit for certain small businesses and a “nationwide insurance pool called the Health Insurance Exchange.” *See* Senator Max Baucus, Call to Action: Health Reform 2009, Senate Finance Committee White Paper (Nov. 12, 2008).

Senator Baucus modeled his small-business tax credit proposal on a bipartisan bill that had been referred to the Finance Committee in 2008, which conditioned credits on states establishing Exchanges and enacting other health insurance laws. *See* Small Business Health Options Program Act, S. 2795, 110th Cong. (2nd Sess. 2008) (offering tax credits to “qualified small employers” that “purchas[e] health insurance coverage for [their] employees in a small group market in a State which . . . maintains a State-wide purchasing pool that provides purchasers in the small group market a choice of health benefit plans, with comparative information provided concerning such plans and the premiums charged for such plans made available through the Internet”); Baucus, Call to Action, *supra*, at 20 (“Initially, the credit would be available to qualifying small businesses that operate in states with patient-friendly insurance rating rules.”); *id.* at 32 n.10.

In 2009, Baucus continued to model his proposal on a re-introduced version of S. 2795 called the Small Business Health Options Program Act of 2009 (S. 979). *See* Small Business Health Options Program Act of 2009, S. 979, 111th Cong. (1st Sess. 2009) (identical language to S. 2795). *See also* Senator Max Baucus, Description of Policy Options – Expanding Health Care Coverage: Proposals to provide affordable coverage to all Americans, S. Comm. Fin. White Paper (May 14, 2009) (“Micro-groups (2-10 employees) could purchase insurance through the Health Insurance Exchange immediately. The remainder of small employers can purchase through the Health Insurance Exchange once the federal rating rules are fully phased in by their state.”); S. Comm. Fin., Framework for Comprehensive Health Reform 3 (Sept. 8, 2009)

(proposing small-business tax credits available through “a SHOP exchange modeled after S. 979, the ‘Small Business Health Options Program Act’”); S. Comm. Fin., America’s Healthy Future Act, Chairman’s Mark (Sept. 22, 2009) (“If a State has not yet adopted the reformed rating rules, qualifying small employers in the state would not be eligible to receive the credit”); America’s Healthy Future Act of 2009, S. 1796, 111th Cong. 182-83 (1st Sess. 2009) (“STATE FAILURE TO ADOPT INSURANCE RATING REFORMS.—No credit shall be determined under this section with respect to contributions by the employer for any qualified health benefits plans purchased through an exchange for any month of coverage before the first month the State establishing the exchange has in effect the insurance rating reforms described in subtitle A of title XXII of the Social Security Act”); S. Rep. No. 111-89 (2009) (“If a State has not yet adopted the reformed rating rules, qualifying small business employers in the State are not eligible to receive the credit”).

Supporters disagreed over whether health insurance Exchanges should be state-operated. Many observers, including state officials, favored a system of 50 state-run Exchanges rather than a single, nationwide Exchange operated by the federal government. *See* Adler & Cannon, *supra*, 148-49 n.107; *see also* NAIC Ltr. to Speaker Pelosi and Majority Leader Reid (Jan. 6, 2010) (“We urge Congress to take advantage of state expertise, experience, and resources in implementing this legislation by ensuring that states retain primary responsibility for regulating the business of insurance and that health insurance Exchanges be established and administered at the state level with the flexibility to meet the needs of our local markets and consumers.”). Key U.S. senators also favored state-run Exchanges. *See* Patrick O’Connor & Carrie Brown, Nancy Pelosi’s Uphill Health Bill Battle, Politico (Jan. 9, 2010) (“Two key moderates—Sen. Ben Nelson (D-Neb.) and Sen. Joe Lieberman (I-Conn.)—have favored the state-based exchanges

over national exchanges.”). *See also* Reed Abelson, *Proposals Clash on States’ Roles in Health Plans*, N.Y. Times (Jan. 13, 2010) (“The state-federal divide between the House and Senate could be a difficult gap to bridge. One possible compromise would be to have a federal exchange set up alongside the state exchanges. Senator Ben Nelson, Democrat of Nebraska, is a former governor, state insurance commissioner and insurance executive who strongly favors the state approach. His support is considered critical to the passage of any health care bill.”); Carrie Brown, *Nelson: National Exchange a Dealbreaker*, Politico (Jan. 25, 2010).

Washington & Lee University law professor Timothy Jost was a frequent participant in the health care reform debate who appears to have had some influence over the process. Press Release, W&L Law’s Jost Invited to Health Care Bill Signing Ceremony (March 23, 2010), <http://law.wlu.edu/news/storydetail.asp?id=758> (quoting Jost as having attended the ceremony with “secretaries and Congress people and various other leaders who had worked on the bill”). In early 2009, Jost noted a problem Congress would encounter if it chose state-run Exchanges, and offered a solution that mirrored the approach taken by S. 2795 and Baucus’s white paper with regard to small-business tax credits:

The Constitution has been interpreted to preclude Congress from passing laws that “commandeer” the authority of the states for federal regulatory purposes. That is, Congress cannot require the states to participate in a federal insurance exchange program by simple fiat. This limitation, however, would not necessarily block Congress from establishing insurance exchanges. Congress could invite state participation in a federal program, and provide a federal fallback program to administer exchanges in states that refused to establish complying exchanges. Alternatively it could exercise its Constitutional authority to spend money for the public welfare (the “spending power”), either *by offering tax subsidies for insurance only in states that complied with federal requirements (as it has done with respect to tax subsidies for health savings accounts)* or by offering explicit payments to states that establish exchanges conforming to federal requirements.

Timothy Jost, O'Neill Institute Legal Solutions in Health Reform, *Health Insurance Exchanges: Legal Issues* 7 (2009) (emphasis added). As Jost observed, conditioning tax credits or other benefits on state cooperation could induce otherwise reluctant states to establish health insurance Exchanges in accordance with federal requirements.

By late 2009, the authors of both leading Senate bills had abandoned the idea of a single, nationwide Exchange in favor of 50 state-run Exchanges, with the federal government operating Exchanges only in those states that declined to do so. *See, e.g.*, S. Comm. Fin., Framework for Comprehensive Health Reform (Sept. 8, 2009); *see also* S. Comm. Fin., America's Healthy Future Act, Chairman's Mark, (Sept. 22, 2009). The Finance Committee-reported bill expressly conditioned its "premium-assistance credits" on the recipient having enrolled in a health plan "through an exchange established by the State." America's Healthy Future Act of 2009, S. 1796, 111th Cong., 147, 152 (1st Sess. 2009) (specifying that the "premium assistance amount" can only be calculated using premiums from qualified health plans offered in "an Exchange established by the State"; and further providing that taxpayers are eligible for tax credits only during "coverage months," defined by cross-reference as months during which the taxpayer is enrolled in a qualified health plan purchased through "an exchange established by the State"). The bill of the U.S. Senate Committee on Health, Education, Labor, & Pensions ("HELP Committee") revoked "premium credits" from taxpayers who had already been receiving them if their state's "gateways" (i.e., Exchanges) fell out of compliance with federal requirements. Affordable Health Choices Act, S. 1679, 111th Cong. § 3104(b) (2009). This bill also permanently withheld credits from all residents until their state enacted legislation implementing the bill's employer mandate. *Id.* at § 3104(d) (2009). *See also* Adler & Cannon, *supra*, at 154-155.

The decision to condition tax credits on states establishing Exchanges and enacting various health insurance regulations solved an additional problem confronting the Finance Committee. The Finance Committee does not have jurisdiction over non-group health insurance markets. *See* Senate Finance Committee, Jurisdiction, <http://www.finance.senate.gov/about/jurisdiction/>, accessed November 16, 2013 (jurisdiction includes various government health insurance programs, “health and human services programs financed by a specific tax or trust fund,” and “ERISA group health plans”). Such matters lie within the jurisdiction of the HELP Committee. *See* Senate Health, Educ., Labor, and Pensions Comm., About the HELP Committee, <http://www.help.senate.gov/about/>, accessed November 16, 2013 (jurisdiction broadly includes “[m]easures relating to education, labor, health, and public welfare”). It was not sufficient for the Finance Committee to direct the federal government to establish Exchanges whenever states failed to do so. Such a provision may have avoided an unconstitutional commandeering, but the Committee would still lack jurisdiction to legislate in the area of non-group health insurance in the first place. Tax credits, however, are within the Finance Committee’s jurisdiction, as are the conditions Congress imposes on them. Conditioning tax credits on states establishing Exchanges therefore created a jurisdictional hook that enabled the Finance Committee to legislate in an area that would otherwise lie beyond its reach.<sup>2</sup>

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<sup>2</sup> *See* Executive Committee Meeting to Consider Health Care Reform: Before the Senate Committee on Finance, 111th Cong. 326 (2009), <http://www.finance.senate.gov/hearings/hearing/download/?id=c6a0c668-37d9-4955-861c-50959b0a8392> (Sen. Baucus explains, in response to an objection by Sen. John Ensign (R-NV), that the Finance Committee has jurisdiction to direct states to establish Exchanges and enact other health-insurance measures because the bill “conditions” tax credits on same). Note the official transcript erroneously quotes Baucus as saying, “Taxes *aren’t* the jurisdiction of this committee.” Video of the markup shows Baucus correctly said “are in.” Executive Committee Meeting to Consider an Original Bill Providing for Health Care Reform: Before the S. Comm. on Finance, C-SPAN (starting at 2:53:21) (Sept. 23, 2009), <http://www.c-span.org/>

When Senate leaders merged the Finance and HELP bills to create the PPACA, they retained the Finance Committee's language restricting eligibility for "premium-assistance tax credits" to taxpayers in states that establish Exchanges. Indeed, at the same time the PPACA's authors dropped the Finance Committee language conditioning *small-business* tax credits on states enacting certain health-insurance laws, they *strengthened* the language conditioning premium-assistance tax credits on states establishing an Exchange. *Compare* America's Healthy Future Act of 2009, S. 1796, 111th Cong. § 1205 *with* PPACA § 1401 and 26 U.S.C. § 36B (cross-reference in "coverage months" definition augmented with explicit requirement that tax credit recipients be enrolled in a qualified health plan "through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act"). The Senate approved the PPACA on December 24, 2009. U.S. Senate Roll Call Votes 111th Congress - 1st Session, H.R. 3590 (Patient Protection and Affordable Care Act ) (December 24, 2009), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00396](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396).

The Senate bill differed in that respect from the House's competing legislation. The House had already passed a bill creating a single, nationwide Exchange administered by the federal government. Affordable Health Choices for America Act, H.R. 3962, 111th Cong. (1st Sess. 2009). Like the HELP bill, the House bill would have allowed states to operate Exchanges, generally allowed health-insurance subsidies through either type of Exchange, and contained explicit language creating full equivalence between Exchanges operated by states and the federal government. *See* Adler & Cannon, *supra*, at 159.

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[spanvideo.org/program/289085-4](http://spanvideo.org/program/289085-4). This material error appears uncorrected in the government's Exhibit 30.

Many House members disapproved of the Senate bill's approach to Exchanges. In a letter to the President and the House leadership, for example, 11 members from Texas noted that their state had failed to take advantage of a conditional benefit Congress had offered under the Children's Health Insurance Program Reauthorization Act of 2009, leaving the intended beneficiaries of that law "no better off." The letter's authors warned that under the Senate bill, residents of recalcitrant states likewise would be left "no better off." U.S. Rep. Doggett: Settling for Second-Rate Health Care Doesn't Serve Texans, *My Harlingen News* (Jan. 11, 2010) ("A state-based plan . . . relies on laggard state leadership that, in Texas, would be unwilling or unable to administer the exchange, leaving millions of Texans no better off . . . . Not one Texas child has yet received any benefit from the Children's Health Insurance Program Reauthorization Act (CHIPRA), which we all championed, since Texas declined to expand eligibility or adopt best practices for enrollment . . . . The Senate approach would produce the same result—millions of people will be left no better off than before Congress acted."). *See also* Julie Rovner, House, Senate View Health Exchanges Differently, *Nat'l Public Radio* (Jan. 12, 2010) (the letter's authors "worry that because leaders in their state oppose the health bill, they won't bother to create an exchange, leaving uninsured state residents with no way to benefit from the new law").

In a special election for the U.S. Senate on January 19, 2010, Massachusetts voters placed in the Senate Scott Brown, who had vowed to join a filibuster of any compromise between the House bill and the PPACA. With Brown's election, the prospect of enacting anything but the PPACA disappeared. *See* Michael Cooper, G.O.P. Senate Victory Stuns Democrats, *New York Times* (January 19, 2010), <http://www.nytimes.com/2010/01/20/us/politics/20election.html> ("Mr. Brown has vowed to oppose the bill, and once he takes office the Democrats will no longer control the 60 votes in the Senate needed to overcome filibusters"). Following Senator Brown's



election, the *only* way Congress could enact a comprehensive health reform bill was if the House accepted the PPACA—including the PPACA’s language conditioning premium-assistance tax credits on states establishing Exchanges. In other words, the choice for health care reform supporters was either a Senate bill that many found unsatisfactory or no bill at all.

The House approved the PPACA on March 21, 2010, after receiving assurances the Senate would approve the limited changes the House planned to make to the PPACA bill through the Health Care and Education Reconciliation Act. Pub. L. No. 111-152, § 1204, 124 Stat. 1029, 1055-56 (2010) (“HCERA”). Because the HCERA would be passed by the Senate through the reconciliation process, the range and types of amendments that could be offered to the bill were limited. *See generally* Cong. Res. Serv., The Budget Reconciliation Process: The Senate’s “Byrd Rule” (July 2, 2010), *available at* <https://openers.com/document/RL30862/> (explaining how Senate rules governing the budget-reconciliation process generally disallow legislative provisions not related to deficit reduction, and the reasons House and Senate leaders chose the reconciliation “sidecar” strategy for enacting the PPACA). In other words, health care reform supporters lacked the votes to enact changes many might have wanted. And in particular, due to Senate rules, it is highly unlikely the reconciliation could have been used to authorize tax credits in federally established health insurance exchanges. *See* Declaration of Douglas Holtz-Eakin in *Halbig v. Sebelius*, No. 13-cv-623 (D.D.C. Nov. 18, 2013), Att. A, ¶¶ 14-16. The President signed the PPACA into law on March 23, 2010, and signed the HCERA one week later.

In any event, the HCERA amended PPACA § 1401, 26 U.S.C. § 36B, seven times, but it did not alter the law’s tax-credit eligibility rules. *See* Adler & Cannon, *supra*, at 162-163. Among other changes, the HCERA provided that Exchanges established by U.S. territories would be treated as if they had been established by states. HCERA § 1204, 124 Stat. at 1055-56

(“A territory that elects . . . to establish an Exchange in accordance with part II of this subtitle and establishes such an Exchange in accordance with such part shall be treated as a State for purposes of such part.”). No amendment was adopted to create equivalence between state-established Exchanges and federal Exchanges.

As noted above, the HCERA also imposed certain reporting requirements on “[e]ach Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act).” HCERA § 1004, 124 Stat. at 1035; PPACA § 1401 (adding § 36B(f) to Title 26). Of note, this amendment separately identified both Section 1311 Exchanges and Section 1321 Exchanges, reflecting the understanding that these two types of Exchanges are legally distinct. Were Exchanges established by a state under Section 1311 and federally facilitated Exchanges created under Section 1321 equivalent, as the government now claims, there would have been no need to identify them separately.

Some PPACA supporters may have *preferred* to authorize tax credits through both state-run and federal Exchanges, but like many proposals that could not command enough votes to pass the Senate, this was no longer an option. *See, e.g.*, Shailagh Murray and Lori Montgomery, Deal on health bill is reached (December 20, 2009), [http://articles.washingtonpost.com/2009-12-20/politics/36866199\\_1\\_health-bill-gop-yields-government-insurance-option](http://articles.washingtonpost.com/2009-12-20/politics/36866199_1_health-bill-gop-yields-government-insurance-option) (“Many liberals, however, were bitterly disappointed with the bargains [Senate Majority Leader Harry] Reid [D-NV] struck to win support from moderates in his caucus, any member of which could demand alterations in exchange for his or her support. Democratic leaders dropped a government insurance option and the idea of expanding Medicare to younger Americans. Reid also omitted language that would have eliminated the federal antitrust exemption for health insurers—another

nonstarter for [Senator Ben] Nelson [D-NE].”). The choice faced by health care reform supporters was between a bill many found inadequate and no bill at all. *See* Letter from Henry J. Aaron, Senior Fellow, The Brookings Institution, et al. to Nancy Pelosi, Speaker of the House, et al. (Jan. 22, 2010), available at <http://www.newrepublic.com/blog/the-treatment/47-health-policy-experts-including-me-say-sign-the-senate-bill> (51 signatories, including “long-standing advocates of progressive causes” and others who “are nonpartisan or identify as political moderates,” acknowledged that the PPACA is “imperfect” but urged House leaders to “adopt the Senate bill, and the President must sign it”). *See generally*, Kate Nocera, Bill Clinton: Obamacare was ‘Best Bill You Could have Passed’, Politico (Feb. 8, 2013), <http://www.politico.com/story/2013/02/bill-clinton-obamacare-was-best-bill-you-could-have-passed-87380.html> (quoting former President William Clinton telling Democratic congressional caucuses the PPACA “was the best bill you could have passed in the Congress under the circumstances given the filibuster problem in the Senate”).

The federal government would like this Court to believe that the language limiting tax credits and subsidies to state-run Exchanges is a mistake, perhaps even a drafting error. The mistake, if there was one, was not that the text of the PPACA somehow failed to capture congressional intent, but that Congress failed to anticipate the widespread rejection by states of the role the law had assigned them.

As was widely reported at the time of the PPACA’s enactment, PPACA proponents were confident that all states would establish Exchanges and never even contemplated the possibility that numerous states would refuse. *See* Remarks on Health Insurance Reform in Portland, Maine, 2010 Daily Comp. Pres. Doc. 220 (Apr. 1, 2010) (quoting President Barack Obama, “by 2014, each state will set up what we’re calling a health insurance exchange”). *See also* Dep’t of Labor,

Health & Human Servs, Educ., & Related Agencies Appropriations for 2011, Hearing Before a Subcommittee on Appropriations, House of Representatives, 111th Cong. 171 (Apr. 21, 2010) (statement of Kathleen Sebelius, Secretary, Department of Health & Human Services), <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg58233/pdf/CHRG-111hhrg58233.pdf> (“We have already had lots of positive discussions, and States are very eager to do this. And I think it will very much be a State-based program.”). *See also* Robert Pear, U.S. Officials Brace for Huge Task of Operating Health Exchanges, N.Y. Times (Aug. 4, 2012) (“When Congress passed legislation to expand coverage two years ago, Mr. Obama and lawmakers assumed that every state would set up its own exchange . . . running them [is] a herculean task that federal officials never expected to perform”). *See also* Tom Howell Jr., After Obamacare Health Exchange Deadline Passes, 26 States Opt In with Feds, Wash. Times (Feb. 16, 2013), <http://www.washingtontimes.com/news/2013/feb/16/after-obamacarehealth-exchange-deadline-passes-26/?page=all> (“The Obama administration says it will be ready to run exchanges in more than half of the states . . . . ‘It’s not what the drafters of the bill had hoped would happen,’ Timothy S. Jost, a professor at Washington and Lee University School of Law who specializes in health care, said of the outcome on Friday.”). *See also* Ezra Klein and Sarah Kliff, Obama’s Last Campaign: Inside the White House Plan to Sell Obamacare, Wash. Post (July 17, 2013) (noting an “internal White House memo” detailing obstacles to PPACA implementation did not even identify “political opposition or widespread state resistance” as potential hurdles). When the President signed the PPACA into law “there was widespread expectation [states] would want to operate the new insurance exchanges.” *Id.*

Indeed, the assumption that states would create their own Exchanges as called for by the PPACA was nearly universal among the PPACA’s supporters in Congress and the executive. *But*

see U.S. Rep. Doggett: Settling for Second-Rate Health Care Doesn't Serve Texans, My Harlingen News, Jan. 11, 2010 (warning that Texas, for one, might not cooperate with the PPACA's approach to Exchanges). The Congressional Budget Office scored the PPACA without considering whether tax credits would be limited to state-run Exchanges, but that was because it also scored the bill as if federal government would not have to spend any money paying to implement federal Exchanges. See Adler & Cannon, *supra*, at 186-188. Indeed, the PPACA never authorized money for the creation of federal Exchanges, because bill supporters did not expect that such funds would be necessary. J. Lester Feder, HHS May Have to Get 'Creative' on Exchange, Politico (Aug. 16, 2011, 6:54 PM), <http://www.politico.com/news/stories/0811/61513.html> ("A quirk in the Affordable Care Act is that while it gives HHS the authority to create a federal exchange for states that don't set up their own, it doesn't actually provide any funding to do so. By contrast, the law appropriates essentially unlimited sums for helping states create their own exchanges. The lack of funding for a federal exchange complicates what is already a difficult task."). This situation is not anomalous. Recent events have shown many PPACA supporters made many misjudgments about how the law would be implemented.

**B. Congress Routinely Conditions Federal Benefits On State Action To Induce the States To Carry Out Federal Priorities**

The provisions in the PPACA conditioning premium-assistance tax credits on state willingness to establish health insurance Exchanges embody a traditional legislative means of inducing state cooperation. The federal government "may not compel the states to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). See also *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require States to

govern according to Congress's instructions.''); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). It can, however, provide various incentives for state cooperation. Accordingly, it is routine for Congress to provide financial incentives to encourage states to enact desired legislation. Such incentives often include direct federal spending, as with the PPACA's expansion of the Medicaid program, but often include tax incentives for state citizens. The following examples of enacted and proposed conditional benefits demonstrate that conditioning federal benefits, in general, and favorable tax treatment for state residents, in particular, is routine and was part of the debate over the PPACA.

### 1. Medicaid

The largest and best-known example of Congress conditioning direct spending on state laws is the Medicaid program. For 47 years, Congress has conditioned Medicaid grants to states on states enacting and operating a Medicaid program that meets federal specifications. 42 U. S. C. §1396c; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2601-02. Both the Finance bill and the final PPACA again employed this device with respect to Medicaid. Each conditioned all existing federal Medicaid grants on states expanding their programs to cover all legal residents with incomes below 138 percent of the federal poverty level.<sup>3</sup> America's Healthy Future Act, of 2009, S. 1796, 111th Cong. (1st Sess. 2009); PPACA Section § 2001.

The amount of money Congress originally conditioned on states implementing the PPACA's Medicaid expansion far exceeds the amount it conditioned on states establishing Exchanges. As enacted, the PPACA conditioned all Medicaid grants to states on states' implementing the Act's Medicaid expansion. The tax credits Congress conditioned on states

<sup>3</sup> In *NFIB v. Sebelius*, the Supreme Court ruled that conditioning existing Medicaid grants on states implementing the expansion was coercive and thus unconstitutional. But the court allowed Congress to condition the PPACA's new Medicaid grants on states implementing the expansion. 132 S. Ct. at 2607-08.

establishing Exchanges were small in comparison. *Compare* Office of Management and Budget, Fiscal Year 2014; Historical Tables - Budget of the U.S. Government 163, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/hist.pdf> (showing federal Medicaid grants to states exceeded \$250 billion annually even before the PPACA increased federal Medicaid spending); *and* Cong. Budget Office, The Budget and Economic Outlook: Fiscal Years 2013 to 2023, 16 (2013) (showing Exchange-related subsidies will total just \$21 billion in 2014, and will remain less than one-quarter the amount of total federal Medicaid grants through 2023) (with authors' calculations).

This remains the case, even after the Supreme Court's decision in *NFIB v. Sebelius*. *See* 132 S. Ct. at 2607 (allowing states to decline the PPACA's Medicaid expansion without losing the "old" Medicaid grants). The tax credits are comparable to the "new" Medicaid grants that remain conditioned on states implementing the Medicaid expansion. Cong. Budget Office, Updated Estimates for the Insurance Coverage Provisions of the Affordable Care Act (March 13, 2012) (showing the "new" Medicaid grants to be roughly equal to the amount the PPACA conditions on states establishing Exchanges).

Indeed, for the first few years, at least, the Medicaid-expansion funds are so substantially larger than the tax credits that it is likely that in 2014, the 25 states that are not implementing the Medicaid expansion will forgo more federal subsidies than the 34 states that have opted not to establish an Exchange. *Compare* Updated Estimates for the Insurance Coverage Provisions, *supra*, at 11, *with* Budget and Economic Outlook, *supra*, at 16.

## **2. State Children's Health Insurance Program**

In 1997, Congress enacted the State Children's Health Insurance Program ("SCHIP"), which conditions federal grants to states on each state's implementation of a health insurance

program for children with low-to-moderate incomes. Congr. Res. Serv., State Children's Health Insurance Program (CHIP): A Brief Overview (March 18, 2009), <https://openers.com/document/R40444/> (“All states, the District of Columbia, and the five territories have CHIP programs.”).

In 2009, Congress reauthorized SCHIP with the Children's Health Insurance Program Reauthorization Act (CHIPRA). *Id.* Over a five-year period, CHIPRA conditioned a total of \$100 million in grants on states expanding outreach and enrollment activities, plus \$225 million on states taking steps to intended to improve the quality of care for covered children. The Commonwealth Fund, *The Children's Health Insurance Program Reauthorization Act: Progress After One Year, States in Action* (May 2010).

### 3. *Exchanges*

The Finance bill and the PPACA created a financial penalty of sorts to induce states to establish Exchanges. Each bill imposed a “maintenance of effort” (“MOE”) requirement that required states to keep their Medicaid-eligibility levels for adults exactly where they were on the date of the bills’ enactment. The bills conditioned the lifting of this requirement on states establishing fully operational health insurance Exchanges. *See* S. Rep. No. 111-89 (2009). *See also* Ctrs. for Medicare and Medicaid Servs., State Medicaid Director Letter 11-001, ACA 14 (Feb. 25, 2011), <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd11001.pdf> (“The MOE provisions in the Affordable Care Act specify that existing coverage for adults under the Medicaid program generally remains in place until the Secretary determines that an Exchange *established by the State under section 1311* of the Affordable Care Act is fully operational, which is likely to be January 1, 2014”) (emphasis added). This was not only the same sort of financial incentive as the conditions imposed on



premium-assistance tax credits, but it also had the same object: to encourage states to establish Exchanges.

This approach of encouraging the states to establish Exchanges was not uncommon in the run-up to the PPACA. The Finance bill, the HELP bill, and the PPACA all included incentives for states to establish Exchanges, offering unlimited start-up funds to states who agreed to establish a compliant Exchange. *See* America's Healthy Future Act of 2009, S. 1796, 111th Cong. § 2237(c) (2009); Affordable Health Choices Act, S. 1679, 111th Cong. § 3101(a) (2009); 42 U.S.C. § 18031(a)(2). And HELP Committee Republicans offered an alternative bill that would have conditioned new Medicaid payments to states on states' establishing Exchanges meeting that bill's requirements. Patients' Choice Act, S. 1099, 111th Cong. (1st Sess. 2009).

#### **4. Medical Malpractice Liability Reform**

The PPACA adopted language from the Finance bill expressing the "sense of the Senate" that Congress should condition grants to states on states' enacting laws to reform medical malpractice liability. S. Rep. No. 111-89. ("This provision would express the sense of the Senate that (1) health reform presents an opportunity to address issues related to medical malpractice and medical liability insurance, (2) states should be encouraged to develop and test alternatives to the current malpractice tort system, and (3) Congress should consider establishing a state demonstration program to evaluate alternatives to the existing malpractice tort system with respect to resolution of malpractice claims."). During the Finance Committee's mark-up of S. 1796, Republican senators offered amendments that would have conditioned new Medicaid grants on states enacting medical malpractice reforms. *Id.*

The PPACA created just such a conditional-grant program, as did the House-passed Affordable Health Choices for America Act. PPACA §10607; Affordable Health Choices for America Act, H.R. 3962, § 2531, 111th Cong. (1st Sess. 2009).

#### **5. Employer Mandate**

The HELP Committee bill conditioned its version of premium credits on states enacting laws to implement that bill's employer mandate. *See* Affordable Health Choices Act, *supra*, § 3104(d). *See also* Adler & Cannon, *supra*, at 155-56. Under the HELP bill, Prof. Jost has explained, "[a] state's residents will only become eligible for federal premium subsidies, however, if the state provides health insurance for its state and local government employees." Timothy Jost, Health Insurance Exchanges in Health Care Reform Legal and Policy Issues, Washington and Lee Public Legal Studies Research Paper Series (2009). The bill also revoked premium credits from taxpayers who had already been receiving them if their state fell out of compliance. *See* Affordable Health Choices Act, *supra*, § 3104(b)(2).

#### **6. Health Coverage Tax Credit**

Congress also routinely conditions tax preferences on states' enacting certain laws. For example, in 2002, Congress created "health coverage tax credits" (HCTCs) under the Trade Adjustment Assistance Reform Act. 26 U.S.C. § 35. The HCTC pays, through a credit, 72.5 percent of qualified health insurance premiums for certain taxpayers. These credits bear many similarities to the premium-assistance tax credits created by the PPACA in Section 36B. For example, like Section 36B, Section 35(b) uses a concept called a "coverage month" to set eligibility rules for the tax credits it creates. In particular, 26 U.S.C. § 35(e)(2) conditions eligibility for certain individuals on whether states have enacted laws ensuring that their coverage meets certain requirements. *See, e.g.,* Congr. Res. Serv., Health Coverage Tax Credit

Offered by the Trade Act of 2002 at ii (January 31, 2008), <http://w1storage.net/file/crs/RL32620.pdf> (“The HCTC can be claimed for only 10 types of qualified health insurance specified in the statute, 7 of which require state action to become effective”); Congr. Res. Serv., Health Coverage Tax Credit (January 5, 2011), <http://www.taacoalition.com/sites/default/files/HCTC.pdf>.

#### **7. *Health Savings Accounts***

Since 2004, Congress has allowed qualified individuals to make tax-free contributions to health savings accounts (HSAs), but conditioned those tax benefits on states enacting certain laws. 26 USC § 223(c)(2). Prof. Jost explains:

HSAs received federal tax subsidies only when the HSAs were coupled with high deductible health plans. These tax subsidies were only available, therefore[,] in states where high deductible plans were permitted. This in turn meant that some states had to repeal or amend laws limiting plan deductibles. Most states that had provisions limiting high deductible plans quickly fell into line, although a few did not, at least initially.

Timothy Jost, *State-Run Programs Are Not A Viable Option For Creating A Public Plan* (Jun. 16, 2009).

#### **8. *Small Business Tax Credits***

As noted above, in the 110th and 111th Congresses, a bipartisan group of senators, including members of the Finance Committee, sponsored legislation that would create tax credits for certain small businesses. The bills explicitly conditioned tax credits on states creating health insurance Exchanges for small businesses, including the self-employed. S. 2795, *supra*; S. 979, *supra*. Senator Baucus initially used these bills as a model for the small-business tax credit in the Finance Committee bill.

### 9. A “Public Option”

Finally, the Finance Committee’s May 2009 “Description of Policy Options” document proposed encouraging states to establish their own “public option” health plans to compete with private insurers. As a means of encouraging states to create their own “public option,” Prof. Jost again proposed that Congress condition tax credits on state compliance: “Tax credits could be offered to subsidize the purchase of insurance, but only in states that implemented a public program.” Timothy S. Jost, *State Run Programs Are Not A Viable Option For Creating A Public Plan* (June 16, 2009), <http://law.wlu.edu/deptimages/Faculty/Jost%20State%20Run%20Programs.pdf>.

### CONCLUSION

Many provisions of the PPACA have not worked out the way its supporters had hoped. *See, e.g.*, PPACA Implementation Failures: Answers from HHS Before the Energy and Commerce Comm., 113th Cong. (2013) (testimony of Sec. Kathleen Sebelius on the failures of healthcare.gov). Some provisions of the Act have been struck down in Court, *NFIB v. Sebelius*, 132 U.S. at 2600 (striking down mandatory Medicaid expansion). Other provisions have been repealed. *See, e.g.*, American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 642 (2012) (repealing the CLASS Act). *See generally* Congr. Res. Serv., *Enacted Laws that Repeal or Amend Provisions of the Patient Protection and Affordable Care Act (ACA)*; *Administrative Delays to ACA’s Implementation*, Memorandum to Hon. Tom Coburn (September 5, 2013), [www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=b8e7a876-ee12-477f-8c62-a9dd9294f537](http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=b8e7a876-ee12-477f-8c62-a9dd9294f537) (finding Congress has repeatedly amended or repealed discrete provisions of the PPACA). As President Obama recently acknowledged, “Obviously, we didn’t do a good enough

job in terms of how we crafted the law.” NBC News, Watch Chuck Todd's full interview with President Obama (November 7, 2013), <http://www.nbcnews.com/video/nbc-news/53492840>.

If supporters believe the PPACA’s premium-assistance tax credit eligibility rules are flawed, the proper way to repair the statute is through the legislative process. But with this regulation, the IRS has arrogated for itself the power to rewrite a federal statute, triggering federal appropriations and financial penalties beyond those authorized by the legislature. Such “administrative hubris” cannot stand. *See Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791, 797 (11th Cir. 2000). If the IRS can offer premium-assistance tax credits to those who purchase health insurance in federally created Exchanges, there is nothing to stop the IRS from offering them to other ineligible categories of individuals, such as households with income below 100 percent, or above 400 percent, of the Federal Poverty Level, Medicare and VA enrollees, workers with employer-sponsored health insurance, undocumented residents, those who purchase health insurance plans that do not constitute qualified health plans, or those who do not purchase health insurance “through an Exchange.” *See, e.g.*, Sarah Kliff, The Three Things We Learned from Today’s Obamacare Update, Wash. Post Wonkblog, Nov. 19, 2013 <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/11/19/the-three-things-we-learned-from-todays-obamacare-update/>. As the IRS can identify no textual or other basis for its rule, it can provide no limit to the power it asserts here.

The decision to limit the availability of premium-assistance tax credits to the purchase of qualified health insurance plans in Exchanges established by states under Section 1311 may or may not have been a sound policy decision. That is not the question before this Court. The text of the PPACA clearly, consistently, and unambiguously provides premium-assistance tax credits for the purchase of qualified health insurance in Exchanges established by states under Section 1311,

and only in such Exchanges. The remainder of the PPACA's text and legislative history fully support the plain meaning of the text. As a result, the IRS lacks the authority to provide for tax credits in federally facilitated Exchanges.

November 27, 2013

Respectfully submitted,

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**ATTACHMENT A**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, et al.,

Plaintiffs,

v.

KATHLEEN SEBELIUS, et al.,

Defendants.

Case No. 1:13-cv-00623-PLF

**DECLARATION OF DOUGLAS HOLTZ-EAKIN**

I, Douglas Holtz-Eakin, do hereby declare:

1. From 2003-2005, I was the sixth Director of the non-partisan Congressional Budget Office (CBO), which provides budgetary and policy analysis to the U.S. Congress. During my tenure, CBO assisted Congress as it addressed numerous policies—notably the Medicare prescription drug bill (MMA) and its budgetary consequences.

2. Currently, I am President of the American Action Forum and most recently was a Commissioner on the congressionally-chartered Financial Crisis Inquiry Commission.

3. During 2001-2002, I was the Chief Economist of the President's Council of Economic Advisers (where I had also served during 1989-1990 as a Senior Staff Economist).

4. At various times, I have held positions in several Washington-based think tanks, including the Peter G. Peterson Institute for International Economics (2007-2008), the Maurice R. Greenberg Center for Geoeconomic Studies, and the Council on Foreign Relations (2006). I also have been a visiting Fellow at the American Enterprise Institute, Heritage Foundation, and American Family Business Foundation.

5. I have a distinguished international reputation as a scholar doing research in areas of applied economic policy, econometric methods, and entrepreneurship, including academic appointments at Columbia University in 1985 and Syracuse University from 1990 to 2001. At Syracuse, I became Trustee Professor of Economics at the Maxwell School, Chairman of the Department of Economics and Associate Director of the Center for Policy Research. From 1986 to 2001, I served as a Faculty Research Fellow and Research Associate at the National Bureau of Economic Research.

6. I am recognized as one of the country's leading experts on federal budget and tax policy, national health care reform policy, and CBO's practices and procedures for estimating the budgetary costs of proposed congressional legislation.

7. My work requires me to understand and explain the workings and requirements of the congressional rules for budget reconciliation.

8. The purpose of budget reconciliation is to change substantive law so that revenue and mandatory spending levels are brought into line with budget resolution policies. Reconciliation generally has been used to reduce the deficit through spending reductions or revenue increases, or a combination of the two.

9. In the case of the Patient Protection and Affordable Care Act (PPACA), enacted on March 23, 2010, an accompanying law, the Health Care and Education Reconciliation Act (HCERA), enacted on March 30, 2010, utilized budget reconciliation procedures to ensure initial passage of PPACA and change a number of provisions in that previous law.

10. Amici have asked me to examine the procedural context in which those two laws were enacted and to comment on whether a hypothetical scenario could be plausible and possible under Senate budget rules at that time. The issue is: If congressional leaders were concerned that



PPACA did not authorize premium assistance tax credits for coverage purchased through health insurance Exchanges established by the federal government, and were worried that such federal Exchanges would be needed because some states would fail to establish their own Exchanges, what is the likelihood they could have used HCERA to amend PPACA to provide that premium assistance tax credits would be available to enrollees in federal Exchanges?

11. To be clear, I am not commenting on what the Senate originally intended regarding this issue when it passed its final, revised version of H.R. 3590 on December 24, 2009, which eventually became the final text of the PPACA that was approved by the House of Representatives on March 21, 2010, and signed into law by President Obama on March 23, 2010. Nor am I commenting on the proper legal construction of that statute. Instead, I have been asked to answer a different question: If congressional leaders had become aware *on, shortly before, or after March 23, 2010*, that PPACA did not authorize tax credits in Exchanges established by the federal government, and were concerned that federally established Exchanges would be required because some states would refuse to establish their own Exchanges, would they have been able to use the HCERA to amend the PPACA to authorize tax credits through federal Exchanges given Senate budget reconciliation rules and a united 41-vote opposition? In particular, would CBO have been required first to “rescore” the higher budgetary costs of such a proposal, in light of a new budgetary baseline created by such information?

12. The answer is that the Senate in particular would have been extremely limited, and for practical purposes essentially blocked, in trying to “fix” through the budget reconciliation process any possible problems it (hypothetically) might have discovered regarding lack of authority for distributing federal premium assistance tax credits through federal Exchanges.

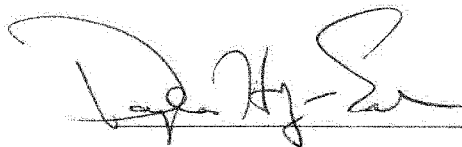
13. Such efforts almost certainly would have been challenged through points of order made during consideration of the reconciliation bill on the Senate floor, under well-established precedents for enforcement of the “Byrd rules” for budget reconciliation, as well as the other pay-as-you-go budgetary rules adopted by both the Senate and House in recent years. In particular, any acknowledgment by congressional leaders that some states would not create Exchanges would have triggered the need for CBO to “rescore” its budget baseline after enactment of PPACA. This new baseline would have found that the new law actually cost potentially hundreds of billions of dollars *less than previously scored* for the period from FY 2010 through FY 2019. Relative to this new baseline, the HCERA’s attempt to authorize tax credits through federal Exchanges would *increase* outlays and deficits by potentially hundreds of billions of dollars, exposing the HCERA to a potential Byrd-rule point of order. Had congressional leaders signaled that the PPACA gives states the authority to veto major provisions of the law, and at the same time given opponents of the law the means to block their effort to strip states of that veto power, it is almost certain that opponents of the law would have made a Byrd-rule point of order.

14. The Senate in particular would have been hard pressed to overcome a point of order under the Byrd rules by opponents of the legislation. The very reason that budget reconciliation through HCERA was attempted in March 2010 was that Senate Democrats no longer could obtain 60 votes in favor of any changes in the PPACA through regular floor procedures. That same number of votes would be needed to overcome either such a point of order or a ruling of the presiding officer of the Senate that the Byrd rules had been violated (for increasing the budget deficit in budget reconciliation; either in the 10-year budget window from FY 2010-2019, or in the 11th year just beyond it—in FY 2020).

15. The only other option available to Senate backers of such a change in the PPACA's final spending and revenue levels—through budget reconciliation—would have required coming up with hundreds of billions of dollars in “offsetting” budget savings elsewhere from FY 2010 through FY 2019. Based on my experience in analyzing for several decades not only congressional budget policy but also the political and economic context in which it must operate, I conclude that the likelihood of pursuing, let alone succeeding in, that legislative path was virtually zero. This would have required them to find and enact potentially hundreds of billions of dollars in political pain (i.e., new revenue or spending reductions) with no corresponding benefits.

16. Therefore, I find that the HCERA could not practically amend any lack of authority for tax credits in federally established health insurance exchanges. With respect to the authority of such Exchanges, the House and Senate had no practical alternative to enacting the provisions included in the original Senate bill, H.R. 3590, which became the final version of the PPACA.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on this 16 day of November 2013.

A handwritten signature in black ink, appearing to read "Douglas Holtz-Eakin", written over a horizontal line.

Douglas Holtz-Eakin

**Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Member, Committee on the Judiciary**

2/6/2014

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OPINION

## Michael McConnell: Obama Suspends the Law

*Like King James II, the president decides not to enforce laws he doesn't like. That's an abuse of power.*

By MICHAEL W. MCCONNELL

July 6, 2013 7:28 p.m. ET

President Obama's decision last week to suspend the employer mandate of the *Affordable Care Act* may be welcome relief to businesses affected by this provision, but it raises grave concerns about his understanding of the role of the executive in our system of government.

Article II, Section 3, of the Constitution states that the president "shall take Care that the Laws be faithfully executed." This is a duty, not a discretionary power. While the president does have substantial discretion about *how* to enforce a law, he has no discretion about *whether* to do so.

This matter—the limits of executive power—has deep historical roots. During the period of royal absolutism, English monarchs asserted a right to dispense with parliamentary statutes they disliked. King James II's use of the prerogative was a key grievance that led to the Glorious Revolution of 1688. The very first provision of the English Bill of Rights of 1689—the most important precursor to the U.S. Constitution—declared that "the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal."

To make sure that American presidents could not resurrect a similar prerogative, the Framers of the Constitution made the faithful enforcement of the law a constitutional duty.

The Justice Department's Office of Legal Counsel, which advises the president on legal and constitutional issues, has repeatedly opined that the president may decline to enforce laws he believes are unconstitutional. But these opinions have always insisted that the president has no authority, as one such memo put it in 1990, to "refuse to enforce a statute he opposes for policy reasons."

Attorneys general under Presidents Carter, Reagan, both Bushes and Clinton all agreed on this point. With the exception of Richard Nixon, whose refusals to spend money appropriated by Congress were struck down by the courts, no prior president has claimed the power to negate a law that is concededly constitutional.

In 1998, the Supreme Court struck down a congressional grant of line-item veto authority to the president to cancel spending items in appropriations. The reason? The only constitutional power the president has to suspend or repeal statutes is to veto a bill or propose new legislation. Writing for the court in *Clinton v. City of New York*, Justice [John Paul Stevens](#) noted: "There is no provision in the Constitution that authorizes the

<http://online.wsj.com/news/articles/SB10001424127087323323004578591503509552688?printMode>

1/3

2/6/2014

Michael McConnell: Obama Suspends the Law - WSJ.com



David G. Klein

president to enact, to amend, or to repeal statutes."

The employer mandate in the Affordable Care Act contains no provision allowing the president to suspend, delay or repeal it. Section 1513(d) states in no uncertain terms that "The amendments made by this section shall apply to months beginning after December 31, 2013." Imagine the outcry if Mitt Romney had been elected president and simply refused to enforce the whole of ObamaCare.

This is not the first time Mr. Obama has suspended the operation of statutes by executive decree, but it is the most barefaced. In June of last year, for example, the administration stopped initiating deportation proceedings against some 800,000 illegal immigrants who came to the U.S. before age 16, lived here at least five years, and met a variety of other

criteria. This was after Congress refused to enact the Dream Act, which would have allowed these individuals to stay in accordance with these conditions. Earlier in 2012, the president effectively replaced congressional requirements governing state compliance under the No Child Left Behind Act with new ones crafted by his administration.

The president defended his suspension of the immigration laws as an exercise of prosecutorial discretion. He defended his amending of No Child Left Behind as an exercise of authority in the statute to waive certain requirements. The administration has yet to offer a legal justification for last week's suspension of the employer mandate.

Republican opponents of ObamaCare might say that the suspension of the employer mandate is such good policy that there's no need to worry about constitutionality. But if the president can dispense with laws, and parts of laws, when he disagrees with them, the implications for constitutional government are dire.

Democrats too may acquiesce in Mr. Obama's action, as they have his other aggressive assertions of executive power. Yet what will they say when a Republican president decides that the tax rate on capital gains is a drag on economic growth and instructs the IRS not to enforce it?

And what of immigration reform? Why bother debating the details of a compromise if future presidents will feel free to disregard those parts of the statute that they don't like?

The courts cannot be counted on to intervene in cases like this. As the Supreme Court recently held in *Hollingsworth v. Perry*, the same-sex marriage case involving California's Proposition 8, private citizens do not have standing in court to challenge the executive's refusal to enforce laws, unless they have a personal stake in the matter. If a president declines to enforce tax laws, immigration laws, or restrictions on spending—to name a few plausible examples—it is very likely that no one will have standing to sue.

Of all the stretches of executive power Americans have seen in the past few years, the president's unilateral suspension of statutes may have the most disturbing long-term effects. As the Supreme Court said long ago (*Kendall v. United States*, 1838), allowing the president to refuse to enforce statutes passed by Congress "would be clothing the president with a power to control the legislation of congress, and paralyze the administration of justice."

2/9/2014

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*Mr. McConnell, a former judge on the U.S. Court of Appeals for the Tenth Circuit, is a professor of law and director of the Constitutional Law Center at Stanford Law School and a senior fellow at the Hoover Institution.*

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OCTOBER 24, 2013 8:57AM

# The Latest Obamacare Case on Appeal

By [ILYA SHAPIRO](#) and [TIMOTHY SANDEFUR](#)

Last year's Supreme Court decision holding that Obamacare imposes a "tax" on people who don't buy health insurance came as a surprise to most Americans. The law doesn't call it a "tax," but a "penalty," and the law's authors and supporters never called it a "tax" when it was enacted. But Chief Justice Roberts and the four liberal justices held that unlike the penalty in the 1922 case of *Bailey v. Drexel Furniture* – which was disguised as a tax – what the Patient Protection and Affordable Care Act imposed looked like a penalty but was really a tax.

One of the problems with that – left unaddressed in the *NFIB v. Sebelius* ruling – is that the Constitution requires "all bills for raising revenue" to "originate" in the House of Representatives. If the PPACA imposes a tax, then it fails this requirement because it originated in the Senate.

That's the argument being made in the case of [Matt Sissel](#), a veteran and small business owner represented by the [Pacific Legal Foundation](#) (including one of us, Sandefur). In [a brief filed yesterday](#) in the U.S. Court of Appeals for the D.C. Circuit,

Sissel's lawyers argue that the Obamacare "tax" originated in the Senate in violation of Constitutional standards.

There's little case law interpreting the Constitution's Origination Clause. The leading case is 1911's *Flint v. Stone Tracy Corp.*, which held that the Clause wasn't violated when the Senate amended a House-passed bill to add a tax to it. The Court held that the Senate – which has the constitutional authority to "propose or concur with amendments" to House-passed revenue bills – was allowed to do this because that Senate amendment "was germane to the subject-matter of the bill." It's hard to see how the "germaneness" requirement was satisfied in the PPACA's case, though. That law originated in the Senate, which took a House-passed bill on a completely different subject (providing incentives for veterans to buy their first homes), deleted its entire text, and replaced it with the bill that became Obamacare. This "shell bill" tactic is not uncommon in legislatures, but the Supreme Court has never held that it satisfies the origination requirement. A federal trial court threw Sissel's case out in June, on the grounds that the Senate's "amendment" satisfied the "germaneness" rule because the original House bill had something to do with taxes. But if the standard is that lax, the Origination Clause would mean nothing: the Senate could originate taxes at any time when they have some extremely broad similarity with some other bill the House has passed. In an age of boxcar-sized omnibus bills, that would be easy to do.

That trial court also said that the Origination Clause doesn't apply to the Obamacare tax anyway, because, while it's a tax, it isn't a "bill for raising revenue." There are precedents that have exempted certain kinds of taxes from the Origination Clause because they're not revenue measures, but are instead earmarked for some specific fund, or are actually just enforcement penalties meant to ensure compliance with another law. But funds raised by the PPACA aren't earmarked – they go into the general Treasury, to be spent as Congress chooses. And in *NFIB*, Chief Justice Roberts's opinion specifically held that the provision at issue is *not* a penalty, but only a tax. It's the reverse of *Drexel Furniture*.

These are reasons why the judge-made exceptions to the Origination Clause shouldn't apply here. But there's a broader reason why the courts should be reluctant to exempt Obamacare. In their decision last year, the majority of justices expressed a desire to



preserve what they saw as democratic lawmaking. “We possess neither the expertise nor the prerogative to make policy judgments,” wrote Roberts. “Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.” Whatever you might think of this idea, if the courts are concerned about our democratic process, they should not hesitate to enforce a constitutional provision designed to preserve democratic accountability.

The Origination Clause was written to ensure that the power to tax – government’s most pervasive, dangerous, and easily abused power – was kept close to the people’s chamber: the House of Representatives, elected every two years directly by local districts. Had Obamacare been properly proposed in the House as a tax on not buying insurance in the first place, it wouldn’t have survived more than a few days – and as it stands the backlash against the law’s enactment swept out the House majority that supported that law. If the courts are concerned with empowering the will of the voters, that’s all the more reason that procedural requirements like the Origination Clause – that help ensure accountability and transparency, and keep the taxing power as close to the people as possible – are fully enforced.

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Topics: [Government and Politics](#), [Health Care & Welfare](#), [Law and Civil Liberties](#)

Tags: [Health Care](#), [Obamacare](#), [D.C. Circuit](#), [Origination Clause](#), [PLF](#)

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[ORAL ARGUMENT NOT YET SCHEDULED]  
NO. 13-5202

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATTHEW SISSEL,  
*Plaintiff-Appellant,*  
v.  
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*  
*Defendants-Appellees.*

---

*On Appeal from the United States District Court  
for the District of Columbia  
Honorable Beryl A. Howell, District Judge*

---

**BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVES TRENT FRANKS,  
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TIM WALBERG, RANDY K. WEBER, SR., BRAD R. WENSTRUP, LYNE A.  
WESTMORELAND, ROB WITTMAN, AND TED S. YOHO,  
IN SUPPORT OF APPELLANT SEEKING REVERSAL**

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**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

**A. Parties, Intervenor, and *Amici*.**

Pursuant to District of Columbia Circuit Rule 28(a)(1), the undersigned counsel certifies that the following Congressional *amici curiae* have joined this brief:

1. Rep. Trent Franks
2. Rep. Michele Bachmann
3. Rep. Joe Barton
4. Rep. Kerry L. Bentivolio
5. Rep. Marsha Blackburn
6. Rep. Jim Bridenstine
7. Rep. Mo Brooks
8. Rep. Steve Chabot
9. Rep. K. Michael Conaway
10. Rep. Jeff Duncan
11. Rep. John Duncan
12. Rep. John Fleming
13. Rep. Bob Gibbs
14. Rep. Louie Gohmert
15. Rep. Andy Harris
16. Rep. Tim Huelskamp
17. Rep. Walter B. Jones, Jr.
18. Rep. Steve King
19. Rep. Doug LaMalfa
20. Rep. Doug Lamborn
21. Rep. Bob Latta
22. Rep. Thomas Massie
23. Rep. Mark Meadows
24. Rep. Randy Neugebauer
25. Rep. Stevan Pearce
26. Rep. Robert Pittenger
27. Rep. Trey Radel
28. Rep. David P. Roe
29. Rep. Todd Rokita
30. Rep. Matt Salmon

31. Rep. Mark Sanford
32. Rep. David Schweikert
33. Rep. Marlin A. Stutzman
34. Rep. Lee Terry
35. Rep. Tim Walberg
36. Rep. Randy K. Weber, Sr.
37. Rep. Brad R. Wenstrup
38. Rep. Lyne A. Westmoreland
39. Rep. Rob Wittman
40. Rep. Ted S. Yoho

Undersigned counsel further certifies that, to the best of his knowledge, all the parties, intervenors, and other *amici* appearing before the district court and in this court are listed in the Opening Brief of the Appellant, Matthew Sissel.

**B. Ruling Under Review.**

Undersigned counsel further certifies that, to the best of his knowledge, the ruling under review is also set forth in the Opening Brief of the Appellant, Matthew Sissel, and is incorporated by reference herein.

**C. Related Cases.**

Undersigned counsel further certifies that, to the best of his knowledge, all related cases, as defined by Circuit Rule 28(a)(1)(C), are set forth in the Brief of the Appellant, Matthew Sissel, and are incorporated by reference herein. The undersigned counsel would add that in *American Physicians & Surgeons, Inc., and Alliance for Natural Health USA v. Sebelius*, No. 13-5003 (D.C. Cir.), the counsel for Appellants in that appeal identified this appeal and *Liberty Univ., Inc. v. Lew*, No. 10-2347 (4th Cir.), as cases in which the plaintiffs-appellants seek to raise a

variant of one of the merits issues – namely, whether the Patient Protection and Affordable Care Act violated the Origination Clause of the U.S. Constitution – that American Physicians & Surgeons, Inc., and Alliance for Natural Health USA ask this Court to address in No. 13-5003.

**D. Grounds for Filing Separately.**

Undersigned counsel further certifies that the separate-brief requirement set forth in Circuit Rule 29(d) does not apply to a governmental entity.

/s/ Joseph E. Schmitz

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**GLOSSARY**

|  |        |
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| Patient Protection and Affordable Care Act ..... | ACA    |
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**INTERESTS OF *AMICI CURIAE***

U.S. Representative Trent Franks is the Chairman of the House Judiciary's Subcommittee on the Constitution and Civil Justice. As chairman, Congressman Franks is the senior member of the House of Representatives specifically charged with jurisdiction over constitutional amendments, constitutional rights, and ethics in government among other issues. Along with the other 39 Members of the House of Representatives joining this brief, *amici* all serve as the immediate representatives of their constituents in the chamber most accountable to them and were constitutionally guaranteed the exclusive prerogative of introducing bills for drawing forth a national revenue under the Origination Clause, Article I, section 7, clause 1 of the U.S. Constitution. The Senate of the United States violated this constitutional safeguard when it "amended" a House bill designed to reduce taxes by substituting the legislative substance of The Patient Protection and Affordable Care Act (ACA), which was one of the largest tax increases in American history, estimated to raise \$675 billion in revenue. The Origination Clause requires that such revenue raising bills originate in the House, not the Senate.

The interests of the *amici* are in protecting their constitutionally guaranteed prerogative and the separation of powers the Origination Clause was meant to ensure. *Amici* are duty bound by their oath of office to "support and defend the Constitution" and their unique positions as the exclusive trustees of the original exercise of the national taxing power.

To that end, *amici* Franks and his colleagues have co-sponsored H. Res. 153 (113<sup>th</sup> Cong., 1<sup>st</sup> Sess.) (Apr. 12, 2013) expressing the Sense of the House of Representatives that ACA “violates article I, section 7, clause 1 of the United States Constitution because it was a ‘Bill for raising Revenue’ that did not originate in the House or Representatives.”<sup>1</sup>

### BACKGROUND AND SUMMARY OF ARGUMENT

On October 8, 2009, the House of Representatives unanimously passed the six-page “Service Member’s Home Ownership Tax Act” (SMHOTA), H.R. 3590, 111<sup>th</sup> Cong. (2009), which was intended *to reduce* taxes by providing a tax credit to certain veterans who purchased homes.<sup>2</sup>

The Senate “amended” H.R. 3590 by deleting its entire text and substituting the 2,074 page bill which Senate Majority Leader Harry Reid referred to as the “Senate Health Care Bill,”<sup>3</sup> which included 17 specifically denominated revenue provisions, including the penalty or “tax” imposed on those non-exempt persons who fail to buy a government approved health insurance policy. 26 U.S.C. §5000A.<sup>4</sup> The Congressional Budget Office estimated that the bill would increase revenue by \$486 billion between 2010 and 2019, one of the largest tax increases in

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<sup>1</sup> See Addendum A.

<sup>2</sup> See Addendum B.

<sup>3</sup> [http://www.reid.senate.gov/newsroom/111809\\_healthcare.cfm](http://www.reid.senate.gov/newsroom/111809_healthcare.cfm).

<sup>4</sup> See Pub. L. No. 111-148 §§ 1513, 9001-9017, and Addendum C for a list and description of all the “tax hikes.”

American history.<sup>5</sup> The Senate returned the “Senate Health Care Bill” with the H.R. 3590 number affixed to it to the House, whereupon it was rushed into passage by the Democratic controlled House without a single Republican vote. On March 23, 2010, the President signed “The Patient Protection and Affordable Care Act,” Pub. L. 111-148 (hereinafter “ACA”).

The legal arguments in this case are straightforward. The Origination Clause of the Constitution, Article I, Section 7, clause 1, provides that “All Bills for raising Revenue shall originate in the House; but the Senate may propose or concur with Amendments as on other Bills.” The “Senate Health Care Bill,” which is one the largest tax increases in American history, did not originate in the House simply by virtue of keeping a House bill number. *Amici* argue in the alternative, that even if it had originated in the House, the Senate’s legerdemain of substituting the SMHOTA with the Senate Health Care Bill was not constitutional for two reasons: (1) SMHOTA was not a revenue raising measure to which the Senate might amend under the second prong of the Origination Clause and (2) even if it were, the total “gut and replace” Senate amendment was not germane to the subject matter of the House bill.

The Origination Clause was a key Constitutional provision upon which the Founders insisted to protect the American people from confiscatory taxes; they

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<sup>5</sup> <http://www.cbo.gov/publication/24998>.

reposed such power to initiate any taxes in the “People’s House” to be exercised by those representatives closest to the citizens. The Origination Clause thus serves an important bulwark to protect the liberty of our citizens. If the interpretation of the Origination Clause by the court below is not reversed, that Clause will be rendered a dead letter.

### ARGUMENT

#### I. THE ORIGINATION CLAUSE IS A PROVISION FOR THE SEPARATION OF POWERS WITHIN THE LEGISLATIVE BRANCH THAT SAFEGUARDS LIBERTY

*“Provisions for the separation of powers within the legislative branch are . . . not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty.”<sup>6</sup>*

The Origination Clause embodies a foundational principle of American jurisprudence that offers a structural constitutional protection against abuses of power by the national government. Without its guarantee in the 1787 Convention and ensuing ratification debates, our Constitution would not exist, at least not in its present form: the restriction of the Senate from originating taxes was the “cornerstone of the accommodation” of the Great Compromise of 1787 which satisfied the necessary number of states to ratify the Constitution.<sup>7</sup> As such, the legislation before this Court under Origination Clause challenge not only impacts

<sup>6</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990).

<sup>7</sup> Delegate Elbridge Gerry, *quoted in* James Madison, *Notes on the Debates in the Federal Convention of 1787*, at 290 (New York, Norton & Company Inc., 1969) [hereinafter Madison].

the House of Representatives' prerogatives of *amici*, but more importantly is a fundamental violation of one of America's most foundational principles: the separation of powers within a national government of limited powers and the guarantee of no taxation without representation.<sup>8</sup>

No American court has ever allowed taxes enacted into law in this manner and on this scale to become the law of the land.<sup>9</sup> Doing so now would wholly disregard and effectively nullify the plain letter and spirit of the Origination Clause. The gravity of the principle at stake, coupled with the Supreme Court's most recent Origination Clause pronouncement that the "Court has the duty to review the constitutionality of [such] congressional enactments"<sup>10</sup> compels this Court to reaffirm the plain guarantee in the Origination Clause that no legislative body or government official but the immediate representatives of "the People" can constitutionally originate the imposition of taxes.

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<sup>8</sup> The Tenth Amendment provides for a separation of powers between the national and State governments. *Amici* submit that the rich Tenth Amendment jurisprudence relied on by the Supreme Court in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), which struck down the Medicaid provisions by a vote of 7-2, provides a rule of construction on how this Court should interpret the Origination Clause: any ambiguities of its provisions should be interpreted in favor of protecting liberty

<sup>9</sup> On the contrary, the excise tax on Cotton Futures Contracts was struck down for violating the Origination Clause. See *Hubbard v. Lowe*, 226 F. 135 (S.D.N.Y. 1915).

<sup>10</sup> *Munoz-Flores*, 495 U.S. at 391.



### A. The Origination Clause Embodies a Foundational Principle

*"[The] distinction between legislation and taxation is essentially necessary to liberty. . . . The Commons of America, represented in their several assemblies, have ever been in possession of the exercise of this their constitutional right of giving and granting their own money. They would have been slaves if they had not enjoyed it."*<sup>11</sup>

Few clauses in our Constitution have such a rich and clear historical significance as the Origination Clause. With its origins in the Magna Carta, the Commons of England fought to preserve and strengthen this right for 500 years before the principle was firmly solidified by the late 17<sup>th</sup> Century in English Parliamentary custom.<sup>12</sup> No principle's neglect has been as responsible for undermining the legitimacy of English speaking governments as the neglect by kings, legislatures, and courts alike of the Origination principle.

To illustrate the strength of the point, consider the decapitation of King Charles I in 1649 following the 30 Years War, and the deposing of King James II following the Glorious Revolution of 1688. These dramatic acts, carried out during America's colonial period, resulted in the British Bill of Rights in the late

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<sup>11</sup> William Pitt, *On an Address to the Throne, in Which the Right of Taxing America is Discussed* (December, 17, 1765) (Protesting the Stamp Act on behalf of the colonists), in Robert Cochrane, *The Treasury of British Eloquence*, 140-41 (W.P. Nimmo, London and Edinburgh, 1877).

<sup>12</sup> Noel Sargent, *Bills for Raising Revenue under the Federal and State Constitutions*, 4 Minn. L. Rev. 330, 334 (1919-1920) ("In the British Parliament, in 1678, it was settled that: (1) 'all bills for purpose of taxation, *or containing clauses imposing a tax*, must originate in the House of Commons and not in the House of Lords'." (emphasis added)).

1680s, which contained one of the early iterations of the Origination Clause.<sup>13</sup> The principle of taxation only by the immediate representatives of the people was so firmly rooted in the English tradition, that its implementation on the American side of the Atlantic was nearly universal in colonial and early state legislatures.

Where Royal charters did not explicitly guarantee the early American colonists this prerogative, they seized it. Under the various names of “House of Delegates,” “Burgesses,” “Commons,” or “Representatives,” the colonists’ lower houses – those closest to the people – were commonly vested with the exclusive right of originating taxes.<sup>14</sup>

Our Founders – often the same individuals who worked to draft the state constitutions with Origination Clauses – enshrined this central procedural limitation on governmental power to “originate Bills for raising Revenue” in Article 1, §7, of our current Constitution.<sup>15</sup>

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<sup>13</sup> See British Bill of Rights, 1 Will. & Mary, Sess. 2, c. 2., § 4 (1688)) (“That levying money for or to the use of the crown, by pretense of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.”).

<sup>14</sup> See, e.g., “An ACT against raising of Money within this Province, without Consent of the Assembly” (1650), reprinted in 75 Thomas Bacon, *The Laws of Maryland* ch. XXV, 37-38 (1765).

<sup>15</sup> For a more detailed account of the origins of the Origination Clause, see Nicholas Schmitz & Priscilla Zotti, *The Origination Clause: Meaning, Precedent, and Theory from the 12<sup>th</sup> to 21<sup>st</sup> Century* (August 12, 2013), forthcoming in BRITISH JOURNAL OF AMERICAN LEGAL STUDIES (2014) (copy on file with undersigned counsel).

**B. The Origination Clause Was a Precondition to the Ratification of the Constitution**

*“In short the acceptance of the plan [U.S. Constitution] will inevitably fail, if the Senate be not restrained from originating Money bills.”<sup>16</sup>*

The principle behind the Origination Clause -- sometimes phrased as “No Taxation Without Representation” -- was the moral justification for our War of Independence. With this war for freedom and liberty in mind, the Origination Clause of our Constitution was written; and without it at the core of the “Great Compromise of 1787,” the 13 original States would never have agreed to ratify the Constitution.

The primary dividing issue between the delegates to the Constitutional Convention of 1787 was the question of how to resolve the method of representation in the upper chamber. The small states preferred to retain the equal representation they had enjoyed under the Articles of Confederation, while the large states wanted to shift the national legislature to a proportional representation of the American population. No disagreement threatened the success of the Convention and the new Constitution more than this one. After a month of heated debate and threats of secession, the delegates finally agreed to the Great Compromise of 1787: a bicameral legislature with equal representation of States in the upper branch, and proportional representation of the nation in the lower

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<sup>16</sup> Madison, *supra*, at 445 (Delegate Elbridge Gerry arguing that the Convention delegates would not sign, and the states would not ratify any new federal Constitution that did not restrict the Senate from originating taxes).

branch. That Great Compromise was only made possible by agreement of both sides to restrict the upper branch from originating money bills.<sup>17</sup>

**C. The Origination Clause Is a Substantive Structural Protection, Not an Accounting Gimmick**

Our Founders were justifiably concerned that the power to raise and levy taxes should originate in the People's House, whose Members are closest to the electorate, with two-year terms.<sup>18</sup> The Senators, by contrast, sit unchallenged for the better part of a decade, do not proportionally represent the American population, and already enjoy their own unique and separate Senate powers intentionally divided by the Founders between the two chambers.

On an even more basic level, a Senate unrestricted from the confines of the Origination Clause would blur the fundamental separation of powers within the legislative branch. The power of the purse was unquestionably reposed in the People's House, and it has remained in that chamber throughout our history. If the Senate can introduce the largest tax increase in American history by simply peeling off the House number from a six-page unrelated bill which does not raise taxes and pasting it on the "Senate Health Care Bill," and then claim with a straight face that the resulting bill originated in the House, in explicit contravention of the supreme law of the land, then the American "rule of law" has become no rule at all.

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<sup>17</sup> *See id.*

<sup>18</sup> *The Federalist No. 52* (James Madison).

**II. THE HISTORY AND PURPOSE OF THE ORIGINATION CLAUSE  
COMPEL THIS COURT TO CONCLUDE THAT THE MASSIVE  
TAXES THAT ORIGINATED AS THE “SENATE HEALTH CARE  
BILL” VIOLATED THE SEPARATION OF POWERS BETWEEN THE  
TWO CHAMBERS**

Even if one views the Constitution as an evolving compact, a modern application of Origination Clause principles to today’s political reality and circumstances would favor re-affirmance of the Origination Clause as a meaningful check on abuses of power. The dangers to the liberty and property of Americans from Senate transgressions of the Origination Clause are greater today for several reasons, not the least of which is that the Constitution was amended in 1913 substantially to expand Congress’ power to create a federal income tax after the Supreme Court could not find that confiscatory power in the Constitution.<sup>19</sup> Now that the taxing power has been greatly expanded, the courts should be increasingly vigilant in applying applicable Constitutional limitations, including the Origination Clause.

At the 1787 Constitutional Convention, George Mason stated the reasons for the impropriety of Senate tax originations:

“The Senate did not represent the *people*, but the *States* in their political character. It was improper therefore that it should tax the people. . . . Again, the Senate is not like the H. of Representatives chosen frequently and obliged to return frequently among the people. They are chosen by the Sts for 6 years, will probably settle themselves

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<sup>19</sup> See *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

at the seat of Govt. will pursue schemes for their aggrandizement – will be able by weary[ing] out the H. of Reps. and taking advantage of their impatience at the close of a long Session, to extort measures for that purpose.”<sup>20</sup>

The ratification debates confirmed this distinction, as summarized by Delegate James Wilson of Pennsylvania: “The two branches will serve as checks upon the other; they have the same legislative authorities, except in one instance. Money bills must originate in the House of Representatives.”<sup>21</sup>

**A. Despite The Direct Election Of Senators Under The Seventeenth Amendment, The Senate Does Not Represent The People In The Same Way As Does The House**

Since 1789, this legal distinction between the People and the States has endured. One of the more obvious reasons for this distinction is representational equality: two Senators from Wyoming (population 570,000) should not enjoy an equal vote on new tax schemes as the two Senators from California (population 38,000,000). Contrast the Senate’s staggering representational inequity to the inherent equality of the House of Representatives: the single member of the House of Representatives from Wyoming represents roughly the same number of constituents as any given member of the House of Representatives from California

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<sup>20</sup> Madison, *supra*, at 443 (James Madison arguing for the necessity of the clause in the Constitutional Convention on August 13, 1787).

<sup>21</sup> James Wilson quoted in “*The Pennsylvania Convention Debates*” (December 1, 1787) reprinted in *The Documentary History of the Ratification of the Constitution Digital Edition*, 451, available at <http://rotunda.upress.virginia.edu/founders/RNCN> [hereinafter “History”].

(approximately 550,000 constituents), and both have equal votes and voices as to the question of whether to impose a tax on each individual citizen.

The ratifying public understood the distinction between representation of the People in the House, and representation of the States in the Senate, and for this reason expressed reservations in 1787 over even granting the Senate the power to agree, amend, or refuse revenue raising bills from the House, let alone permitting the Senate to *originate* tax bills such as ACA.

Moreover, the Founders' provision of the election of Senators by State legislatures instead of the electorate ("the People") further demonstrates the Senate's representation of State's interests rather than the People's interests. To be sure, the adoption of the 17<sup>th</sup> Amendment in 1913 provided for direct election of the Senate by the people instead of state legislatures. But that method of election does not change the fundamental difference between the House and the Senate; it did not make the Senate another "People's House."

The States do not originate and have never originated national taxes. The American people retain that privilege exclusively exercised by their representatives in the House. Accordingly, the Senate cannot be the first to propose taxes such as those in ACA, a \$675 billion revenue raising bill with 20 new taxes.<sup>22</sup>

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<sup>22</sup> See Addendum C.

**B. The Framers Chose The House To Originate Taxes Because The House Is Accountable To The People Every Two Years, While Senators Are Accountable Only Every Six Years**

The Framers made an informed policy decision that six years is too long for federal officers to remain unaccountable for the origination of taxes. Annual elections were the standard for bodies of representative assemblies empowered to originate money bills in the founding era.<sup>23</sup>

Given the intensity of the debate in determining whether two-year terms were conducive to representative democracy when one-year terms were the norm, it is clear that officials who sit unchallenged for the greater part of a decade may not originate tax bills. The ratifying public was also clear that they considered it a protection of their liberty that they could frequently hold accountable public officials for tax originations:

Who are the members that constitute this [House of Representatives] body – the *people* or their representatives? Can they do any act that they themselves are not bound by; and if they lay *excessive taxes*, the people will have it in their power to return other men (vide section 7th of 1st [Article] for the origination of *revenue bill*).<sup>24</sup>

It was no surprise, therefore, that in 2010 the party that did not cast a single vote in the House in favor of ACA in 2009 gained the largest seat change for a midterm election since 1938. The entire House was up for re-election. The

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<sup>23</sup> See Madison, *supra*, at 457.

<sup>24</sup> History, *supra*, at 411 (John Smilie, *quoted in The Pennsylvania Convention Debates* (November 28, 1787).



Senate, by contrast, enjoyed having two-thirds of its members insulated from popular accountability for the measures they had passed the preceding years.

The separation of power “check” provided by the Origination Clause lets the American people know exactly who is responsible for proposing taxes and assures that these individuals are those subject to removal from office most frequently. Since the 2010 elections, the people’s immediate representatives have voted some 40 times to repeal or defund ACA, but the Senators, who sit for six years unchallenged, have never agreed.<sup>25</sup> The Framers exact fear of taxation without adequate representation has materialized due to the complete disregard of the mandates of the Origination Clause by the U.S. Senate.

### **III. THE “SENATE HEALTH CARE BILL,” WHICH IMPOSED THE LARGEST TAX INCREASE IN AMERICAN HISTORY, WAS INDISPUTABLY A “BILL FOR RAISING REVENUE” UNDER THE ORIGINATION CLAUSE**

The lower court held that while the individual mandate “raises revenue,” it was not a “Bill for raising Revenue” for purposes of the Origination Clause and that even if it were, the mandate was a proper Senate “amendment” to a Bill that originated in the House. Slip op. at 13-23. The court was wrong on both counts. *Amici* will first address in this section the issue of whether ACA was a Bill for

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<sup>25</sup> Tom Cohen, *House GOP Launches Shutdown Battle by Voting to Defund Obamacare*, CNN (September 20, 2013) <http://www.cnn.com/2013/09/20/politics/congress-spending-showdown/>.

raising revenue and then address the Senate amendment provision of the Origination Clause in Part IV.

**A. The “Senate Health Care Bill” Is Designed to Raise Billions in Revenue for the General Treasury**

While just the individual mandate of ACA is concededly designed to raise over 36 billion dollars in revenue, the companion revenue raising provisions of ACA, ignored by the district court in her analysis, further demonstrate that the “Senate Health Care Bill” is indeed a massive \$675 billion dollar revenue raising bill. *See* Addendum C.

To ignore the gross difference in scope and scale between the revenue raising nature of all the provisions that make up the “Senate Health Care Bill” and the nature of the revenue provisions in prior Origination Clause cases (which the district court conceded was “sparse”) would do great violence to the Origination Clause and all future massive revenue raising bills. Given that an Origination Clause challenge against a taxing bill of this magnitude has never before been mounted, it is imperative that this Court not sanction the lower court’s superficial analysis of the Origination Clause.

**B. The “Purposive” Test Has No Basis in the History of the Origination Clause**

The lower court narrowly focused on the preposition “for” in the Origination Clause (“Bills *for* raising Revenue”) and held that for any bill that originated in the

Senate to be found in violation of the Origination Clause, the Senate had to specifically and primarily intend, expressly or impliedly, that such revenue, no matter how massive in amount, was “for” the primary purpose of raising revenue and not “for” some other or secondary purpose, regardless of the impact of such a bill on the pocketbook of American citizens. This “purposive” test has no basis in the text or constitutional history of the Origination Clause; the lower court’s reliance on *United States v. Munoz-Flores*, 495 U.S. 385 (1990) to the contrary was seriously misplaced.

### 1. Early American Experience with Taxes

The Colonists thought that anything that taxed them at all *for any reason* was a “money bill” and therefore subject to origination restrictions.

As previously noted, all but one of the first 13 States included an Origination Clause provision in their respective constitutions, and 11 of those did not have a “purposive” test. The Massachusetts Constitution of 1780 was quite explicit and formed the basis of the imported final language of the Federal clause:

[N]o subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature. . . . [and] *all money-bills* shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.<sup>26</sup>

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<sup>26</sup> Mass. Const. (1780) (emphasis added).

## 2. Modification of the Proposed Origination Clause

More compelling evidence that the Founders intended the expansive definition of what is a revenue bill or “money bill” was the modification of the proposed Origination Clause itself.

On August 13, 1787, the Framers were debating a draft version of the Origination Clause that read “Bills for raising money *for the purpose of revenue* or for appropriating the same shall originate in the House of Representatives . . . .” Madison, *supra*, at 442 (emphasis in the original). Significantly, the final version dropped the words “for purpose of revenue.” In doing so, they appeared to have decided that the term “money bills” was a synonym for “bills for raising money” without the limiting “*for the purpose of revenue*” clause. In short, the lower court created a “purposive” test without any historical basis.

Early judicial opinions further demonstrate the Founders’ broad meaning of “bills for raising revenue.” For example, in *United States v. James*, 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875), the court opined:

Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly. . . . In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.

Moreover, *amici* submit that the Origination Clause should be read *in pari materia* with Article I, section 8, clause 7, the power “to lay and collect taxes, duties, imposts, and excises.”

It was this “taxing power” provision upon which the *NFIB* Court upheld the penalty imposed under the individual mandate, and which prompted Chief Justice Roberts to issue this important caveat: “[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution.” 132 S. Ct. at 2598. In other words, the Constitution gives Congress as a whole the “power to lay and collect taxes” (Article I, Section 8, Clause 1), but any bill laying such taxes must originate in the House of Representatives under the Origination Clause.

***C. Munoz-Flores Does Not Support The Lower Court’s “Purposive” Test With Respect To The Billions Raised Under ACA***

According to the lower court’s reading of the Supreme Court’s 1990 decision in *Munoz-Flores*, “so long as the primary purpose of [a revenue raising] provision is something other than raising revenue, the provision is not subject to the Origination Clause.” Slip op. at 13. This conclusion is erroneous.

In *Munoz-Flores*, the Court was considering a challenge to the \$25 assessment levied on defendant convicted of federal immigration violation and whether that provision imposing the small assessment was a “Bill for raising revenue” under the Origination Clause. 495 U.S. at 385. The amounts so collected were to be deposited in a special Victims Fund that was capped, with residual funds, if any, to be deposited in the General Treasury.

Over the government's strong objections that the Court should not even entertain the question because to do so would raise a political question and improperly interfere with Congress's internal procedures, the Supreme Court was emphatic that the Origination Clause challenge is justiciable. *Id.* at 401. In reaching the merits, the Court concluded that the assessment provision was not a Bill for raising revenue for the General Treasury because the funds were earmarked for a special Victims Fund, and that only "incidentally" *if* there were any excess funds in the account and those were deposited in the General Treasury, that fact will not subject the assessment provision to the Origination Clause. *Id.* at 399.

The lower court seriously misconstrued the "incidental" language used in *Munoz-Flores*. The lower court interpreted "incidental" not as the Supreme Court meant, *i.e.*, residual or excess revenue in a relatively small amount that may be deposited in the Treasury; rather, the district court interpreted the word "incidental" to mean "connected with" or "related to" a legislative program that is the subject matter of the law.

Here is what the *Munoz-Flores* Court stated:

As in *Nebeker* and *Millard*, then, the special assessment provision was passed as part of a particular program to provide money for that program -- the Crime Victims Fund. Although *any* excess was to go to the Treasury, there is no evidence that Congress contemplated the possibility of a substantial excess, nor did such an excess in fact materialize. Any revenue for the general Treasury that § 3013 creates is *thus* "incidenta[l]" to that provision's primary purpose.

495 U.S. at 399 (emphasis added).

While *amici* may take issue with the Supreme Court’s conclusion that funds raised and deposited in an earmarked fund are not a bill for raising revenue, what is abundantly clear is that *Munoz-Flores* does not support the lower court’s “purposive” test. Under the lower court’s interpretation of *Munoz-Flores*, the Senate could have originated a bill raising billions of dollars “for the purpose of building new prisons” that would be needed because of increased incarceration caused by the Sentencing Reform Act under consideration in *Munoz-Flores* and it would not be subject to the Origination Clause, even if that revenue were deposited in the Treasury. This radical and sweeping interpretation, nowhere found in *Munoz-Flores*, would render the Origination Clause a nullity

In stark contrast to the small earmarked assessments in *Munoz-Flores*, all of the hundreds of billions to be raised by the penalty provision under the Individual Mandate and other tax provisions go directly into the Treasury. None of those funds are earmarked for a specific program in ACA. That distinction alone should suffice to demonstrate the lower court’s error.

Moreover, the lower court’s conclusion -- that while the revenue “may grow the government coffers,” the revenue generated is “merely ‘incidental’ to the [individual mandate’s] primary purpose” (slip op. at 15) -- also badly mangles the

Supreme Court’s meaning of the word “incidental,” a term which had nothing to do with the “purpose” of the Victims Fund or the “purpose” of ACA.

Accordingly, the Senate Health Care Bill, including the individual mandate’s penalty provision, was a “Bill for raising Revenue” and thus satisfies the first prong on the Origination Clause.

**IV. EVEN IF THE “SENATE HEALTH CARE BILL” ORIGINATED IN THE HOUSE, THE SENATE AMENDMENT GUTTING THE SIX-PAGE HOUSE TAX CREDIT BILL AND REPLACING IT WITH THE 2,047 PAGE ACA IMPOSING \$675 BILLION IN TAXES WAS AN IMPERMISSIBLE, NONGERMANE AMENDMENT**

While the court below held, incorrectly in our view, that ACA “was not a ‘Bill for raising Revenue’,” (slip op. at 17) the court assumed it did for purposes of its analysis of the second prong of the Origination Clause: whether ACA originated in the House and whether the Senate amendment to the House bill was valid. The lower court considered this prong to be the “heart of the origination question in this case.” *Id.*

**A. The “Senate Health Care Bill” Originated In The Senate**

Most of the *amici* were in the House of Representatives during what can only be described as the tumultuous and unconventional legislative process through which ACA originated and was enacted. In every plain English language sense of the word both today and in 1789, ACA “originated” in the Senate as Senator Reid’s self-described “Senate Health Care Bill.” The only part of ACA



that originated in the House was the bill number -- and chamber-specific bill designators did not even exist in the early Congresses.<sup>27</sup>

#### **B. The “Senate Health Care Bill” Was Not Germane To The House Bill**

While the lower court was concerned that it may be a non-justiciable question to determine the merits of whether ACA was a permissible amendment to the House bill, the court nevertheless reached the merits and concluded that the Senate amendment was germane to the House bill. The court’s justiciability concerns were misplaced; the court was also wrong on the merits of the germaneness issue.

##### **1. The Germaneness Issue is Justiciable**

The lower court suggested that deciding the germaneness issue might raise a nonjusticiable political question because it would “express a lack of respect due coordinate branches of government” regarding a “textually demonstrable constitutional commitment of [an] issue to a coordinate branch of government.” Slip op. at 21 (*quoting Baker v. Carr*, 369 U.S. 186 (1962)). The court has it backwards. By not deciding the issue, the court would show a “lack of respect” to the House of Representatives and the Constitution’s textual placement of the sole power to originate taxes or revenue in that body.

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<sup>27</sup> <http://memory.loc.gov/ammem/amlaw/lwhbsb.htm>.

The district court also suggested that the House could have invoked a “blue slip” procedure questioning the germaneness of the Senate’s sleight-of-hand of substituting a 2,047 page half a trillion dollar revenue raising bill for its six-page revenue-reducing bill. Slip op. at 19, n.15. Congressional amici might have had a chance to lodge that complaint through House procedures if their Democratic colleagues who controlled the House then weren’t so pressured to rapidly “pass the [2,047 page] bill so that you can find out what is in it.”<sup>28</sup> Moreover, until the *NFIB* Court decided otherwise, neither the bill’s proponents nor its opponents believed that the mandate penalty was a tax. In any event, the *amici* have asserted and continue to assert their position on the issue by co-sponsoring H. Res. 153 that ACA violated the Origination Clause.

**2. The “Senate Heath Care Bill” Was Not a Permissible Amendment to H.R. 3590, a Bill Providing Tax Credits To Veterans**

***a. The House Bill Was Not a Bill for Raising Revenue***

SMHOTA was intended to reduce taxes by providing a tax credit to certain veterans who purchase houses. Addendum B. To demonstrate that SMHOTA also intended to raise taxes, both the lower court and Appellant Sissel mistakenly assert that SMOTA “raises income taxes on large corporations.” Slip op. at 22; Sissel Br.

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<sup>28</sup> <http://blog.heritage.org/2010/03/10/video-of-the-week-we-have-to-pass-the-bill-so-you-can-find-out-what-is-in-it/>). See also *Munoz-Flores* (duty of court to adjudicate an Origination Clause violation does not depend on whether the House acquiesced in it).

at 26-27 (“bill did raise corporate taxes”). As Section 6 of SMHOTA, entitled “TIME FOR PAYMENT OF CORPORATE ESTIMATE TAXES,” makes clear, the corporate tax- related provision was merely a withholding modification that doesn’t raise revenue or tax rates, but merely collects a small amount more than may otherwise be due, which amount may be refunded or adjusted once the corporation files its annual return.<sup>29</sup>

Because neither the tax credit for veterans provision nor the SMHOTA corporate tax withholding provision were “revenue raising,” any argument that the Senate Health Care Bill for Origination Clause purposes was “germane” to the House bill must necessarily fail since the only “germaneness” between ACA’s massive taxes and the original H.R. 3590 was the word “tax” that appeared in the House Bill. If this is all that is necessary to pass muster under the Origination Clause, the Senate could, for example, take a House bill that simply changed the due date of tax returns from April 15 to April 1 (and merely collected taxes otherwise due two weeks earlier) and gut and replace it with one of the largest tax increases in history (which describes ACA). The reasoning by the court below that would lead to such results is patently erroneous in light of both constitutional history and judicial precedent, as explained below.

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<sup>29</sup> See *Baral v. United States*, 528 U.S. 431, 436 (2000) (“Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax.”).

***b. Even If The Original H.R. 3590 Were a Bill for Raising Revenue,  
The “Senate Health Care Bill” Was an Impermissible Substitute  
Amendment To The House Bill***

Even if H.R. 3590 were originally approved by the House as a bill for raising revenue, which it was not, the conversion of that House bill into a “shell bill” by means of a total substitution of its text with the non-germane text of the “Senate Health Care Bill,” was not a permissible “amendment” as our Founders understood that term. Moreover, this elevation of form over substance is contrary to how even the Senate has heretofore exercised its power to amend “Bills for raising Revenue.” Any Senate amendment to a House bill that has the effect of raising revenue must be “germane to the subject-matter of the [House] bill,” not just to one small provision in that bill as the lower court wrongly assumed.<sup>30</sup> The historical practice of determining “germaneness” as well as Supreme Court precedent does not support the lower court’s novel interpretation.

The House of Representatives has always recognized the principle that the Senate may not design new tax bills. Indeed, when the Framers wrote the Origination Clause, it was clear that the scope of permissible amendments “as on other bills” – regardless of whether or not the bill was for raising revenue -- did not include amendments that were not germane to the subject matter of the bill.<sup>31</sup>

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<sup>30</sup> See *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911).

<sup>31</sup> Asher Crosby Hinds, *Parliamentary Precedents of the House of Representatives of the United States* §1072 (U.S.GPO, 1899) (quoting Continental Congress rule that “No new motion or question or proposition shall be admitted under color of

This was the established standard when the Founders during the Constitutional Convention penned the words “the Senate may propose or concur with Amendments as on other Bills.” In short, no non-germane substitute amendments at all were permitted in 1787 by the unicameral Continental Congress.

After the Constitution was ratified, under our newly established bicameral legislature, designed as it was to prevent creative usurpations of the House’s right to “first ha[ve] and declare”<sup>32</sup> all new tax laws, the House insisted that any Senate amendments altering new tax measures must be germane to the subject matter of the original house revenue bill, not just that the word “tax” appears somewhere in the House bill. Indeed, this is the most direct and logical method to ensure that the Senate does not usurp the House’s taxing power. The House’s definition of this standard as applied to all legislative amendments has historically been quite clear and practicable:

When, therefore, it is objected that a proposed amendment is not in order because it is not germane, the meaning of the objection is simply that it (the proposed amendment) is a motion or proposition on a subject *different from that under consideration*. This is the test of admissibility prescribed by the express language of the rule. (emphasis added).<sup>33</sup>

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amendment as a substitute for a [pending bill] until [the bill] is postponed or disagreed to.”).

<sup>32</sup> See Laws of Maryland, *supra*, ch. XXV, 37-38 (1765).

<sup>33</sup> Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States, §5825 (1907).

The Supreme Court in *Flint v. Stone Tracy*, *supra*, followed this historical practice and rule, finding that the Senate's replacement of just one clause (the inheritance tax) among hundreds of other tax provisions in the Payne Aldrich Tariff Act with a corporate excise tax of equivalent revenue raising value was "germane to the subject-matter of the [House] bill and not beyond the power of the Senate to propose." The court below ignored the context of this germaneness rule to the point of rendering it wholly meaningless. The Senate's modest and germane amendment in *Flint* is substantially different, both qualitatively and quantitatively, from the Senate's wholesale gut and replace of H.R. 3590 with the Senate Health Care Bill that became ACA. The two cases stand as polar opposites on any conceivable spectrum of germaneness.

The lower court misinterpreted *Flint* by erroneously concluding that as long as there is a revenue raising provision in the House bill, the Senate has carte blanche to originate massive new revenues as "amendments." With an understanding of the history of the germaneness rules preceding *Flint*, the "Senate Health Care Bill" amendment to H.R. 3590 was not "germane to" SMHOTA simply because both bills contained the word "tax."

The House has historically enforced the germaneness standard with respect to all legislative amendments, both revenue and non-revenue bills alike, since its earliest days. Moreover, the constitutional issue before this Court only concerns Senate modifications that convert a totally unrelated House measure, revenue

raising or not, to a new and massive revenue raising bill. The Constitution's Origination Clause provides the rule of legislative procedure in those cases. The internal administrative rules of either chamber cannot circumvent this requirement of the supreme law of the land.

The Senate's practice that its amendments to House bills need not be germane cannot possibly serve as the basis of the protection of the People's rights. It is totally at odds with normal Parliamentary procedure, both now and at the time that the Framers granted the Senate the power to amend "as on other bills."

This practice may be admissible in the context of non-revenue raising bills, but the Constitution expressly prohibits this mischief whenever the Senate endeavors effectively to originate taxes. In other words, with regard to the Origination Clause's allowance of the Senate to make "amendments" to House revenue bills "as on other bills," that practice must be viewed in the light of how such amendments were made to those "other Bills" at that time of the Constitution's ratification. Our Founders would not have countenanced the manner in which the "Senate Health Care Bill" was enacted.

To be sure, both Houses are free to adopt rules of procedure that liberalize the non-revenue-raising amendment process of non-revenue bills, but that liberal practice cannot be used to alter the Origination Clause's limitation on the Senate's amendment authority with respect to revenue raising bills.

In this case, any germaneness standard must mean something more -- and indeed amici submit a lot more -- than simply, as the court below put it, “that both the original House bill and the Senate amendment be revenue-raising in nature.”

### CONCLUSION

What is most alarming and dangerous about this case, is that the Senators knew exactly what they were doing in circumventing the Origination Clause. As explained by Senator Reid’s own “Senior Health Counsel”: “[B]asically, we needed a non-controversial House revenue measure to proceed to, so that is why we used the Service Members Home Ownership Tax Act. It wasn’t more complicated than that.”<sup>34</sup> From the perspective of these *amici* Members of the House of Representatives, it could not have been more contrary to the letter and spirit of the Origination Clause than that.

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<sup>34</sup> E-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid, to John Cannan (Apr. 21, 2011, 3:25 p.m.), in John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105:2 LAW LIBRARY JOURNAL, 131, 153 (2013).



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